

CASES

DETERMINED

AT NISI PRIUS,

IN THE

COURT OF KING'S BENCH, &c.

CASES.

DETERMINED AT

Risi Prius,

IN THE

Court of King's Bench,

From the Sittings after EASTER Term 30 GEORGE III.

To the Sittings after MICHAELMAS Term 35 GEORGE III.

BOTH INCLUSIVE.

BY THOMAS PEAKE,

OF LINCOLN'S INN.

THE SECOND EDITION CORRECTED, WITH SOME ADDITIONAL
CASES, AND REFERENCES TO SUBSEQUENT DECISIONS.

LONDON:

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AND
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1810.

PREFACE.

IN the following notes I have endeavoured to unite conciseness with perspicuity; and I might equally avoid a tiresome and useless length of statement, and an obscure brevity. In every case I have stated those circumstances which appeared to me to affect the question before the Court; where arguments have been urged, I have attempted to report them; and when any portion of the pleadings was necessary to elucidate the case, of such it has been my endeavour to give a faithful abstract.

As my desire was to preserve to the profession, such cases *only* as had never yet appeared in print, I have omitted all those in which the same points afterwards came before the Court, and have been reported by the Gentlemen who record its decisions. I have forbore, on the same account, to report any of the cases with which Mr. *Espinasse* has lately favoured the profession (three only excepted); and it may naturally be expected that I should assign a reason for those exceptions.

PREFACE.

The cases of *Knibbs v. Hall*, and of *Smith v. Jamieson*, as here reported, contain *points* not noticed in that Gentleman's reports of those cases; and the case of *Ashley and Harrison* was so nicely distinguished from the case of *Tarleton and McGawley*, which was tried at the same Sittings, that a report of the latter would have been barely intelligible without it.

Understanding that it is the design of Mr. *Espinasse* to continue his Reports, I think it incumbent on me to make an explicit declaration, that I have not any intention of adding a single case to those contained in the present volume; and thus I submit them to the candor of the Profession.

April, 1795.

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CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER EASTER TERM,

30 GEORGE III. 1790.



BRIDGES one, &c. v. FRANCIS.

*Saturday, May
22d, 1790.
At Westminster.*

THIS was an action of *assumpsit* brought by the Plaintiff for business done by him as agent for the Defendant, who was a country attorney.

An agent to a country attorney is not obliged to deliver a bill
ed. *Nelson v. Smith*, 1 Esp. Cas. 221. S. P.

It was objected that the bill was not signed.

Lord KENYON said, that signing a bill was necessary only where it was delivered to the proper client, and not where delivered by the agent to the attorney.

Piggot and *Garrow*, the Defendant's counsel, answered that they did not mean to contend that the bill should be signed and delivered a month previous to the commencement of the action as directed by

the general attorney's act (*a*), but that this case was within the act of the 3 *Jac.* 1. c. 7. which, after enacting that no attorney, solicitor, or *servant* to any, should be allowed from his client or *master*, for any fee &c. unless he has a ticket subscribed &c. further enacts, that "all attornies and solicitors shall give a true bill unto their *masters* or clients, or their assigns, of all other charges concerning the suits which they have for them, subscribed with his own hand and name, before such time as they or any of them shall charge their clients with any the same fees or charges."

LORD KENYON said, he thought there was no weight in the objection, but that, if the Defendant desired it, he would save the point for the opinion of the Court.

The parties then agreed to refer the bill to the Master (*b*).

(*a*) 2 *Geo.* 2. c. 23. It is provided by 12 *Geo.* 2. c. 13. s. 6. that this shall not extend to bills for business done by one attorney for another, and it has been holden, that if an attorney do business for a man who is not at the time an attorney, but who becomes so previous to the commencement of an action for the recovery of the fees, he is within the exception enacted by the latter statute, *Ford v. Maxwell*, 2 *H. Blac.* 589.

(*b*) JONES one, &c. v. PRICE, *K. B.* May 19, 1748, before Lee Ch. Justice at *Westminster*. Case for agent's fees.

Mr. Pratt, who was Counsel for the Defendant, objected that it was incumbent on the Plaintiff to prove a bill delivered pursuant to the stat. of the 3 *Jac.* 1.

Mr. Hume and Mr. Ford, for the Plaintiff, answered, that agents were not within that statute. There was no such thing as an agent when that statute was made, the attornies then came to *London* to solicit their own causes. No settled fees are allowed to agents, nor has the Master power to tax their bills but by agreement of the parties.

LORD CH. JUSTICE LEE said, he was not inclined to nonsuit the Plaintiff

Plaintiff in this case, it not being in his opinion within the statute, but he would reserve the point to be considered, if the Defendant desired it.

Note. It is now usual to refer an agent's bill to the Master for taxation upon the attorney bringing the money into court. *Ex parte Bearcroft, Dougl. 190. in*

Verdict for the Plaintiff. *notis.*

[* 3]

* KENNET and Another, Assignees, &c. v. GREEN-WOLLERS one, &c.

*Wednesday,
May 26th,
At Westminster.*

ASSUMPSIT for money had and received.

The Plaintiffs called *Tyldesley* the bankrupt as a witness. He was examined on the *voir dire* by the Defendant's counsel, and on such examination it appeared that this was the second time he had become a bankrupt. That under the first commission he had paid 16s. in the pound, but had not paid any dividend under the second commission, though he had obtained a certificate of his conformity.

A bankrupt who has not paid 15s. in the pound under a second commission cannot be a witness for the assignees under that commission.

Erskine, for the Plaintiffs, admitted he would not be a competent witness without a release, but contended, that when a release was executed by him, he would be an admissible witness, as much as if only one commission had issued.

Lord KENYON. This differs from the case of a first commission, there the bankrupt can have no interest beyond his allowance and surplus: but here he is swearing to increase his estate, and by that means to discharge his future effects, which remain liable under this second commission, until he pays 15s. in the pound. For in a second commission, the certificate does not discharge his future effects unless he pays that

CASES AT NISI PRIUS,

sum (a). This is a plain interest in the event of the cause, and makes him an incompetent witness.

He was therefore rejected, and the Plaintiffs not having any other evidence were nonsuited.

(a) 5 Geo. 2. c. 30. § 9. *Phil- v. Martin*, 3 Esp. 195. 1 Bos. and
pot v. Cordon, 5 T. Rep. 287. *Ha- Pul.* 467. *Peake*, Law Ev. 369.
Wiland v. Cook, *ib.* 655. *Gregory*

CRISTIE A. COWELL.

Words action-
able *in themselves*,
as containing a
charge of felony,
if spoken in re-
ference to a
trespass or
breach of con-
tract, are not so.

THIS was an action for words. The words proved were, "He is a thief, for he has stolen my beer."

It appeared in evidence that the Defendant was a brewer, and that the Plaintiff had lived with him as servant; in the course of which service he had sold beer to different customers of the Defendant, and received money for the same, which he had not duly accounted for.

Lord KENYON directed the Jury to consider whether these words were spoken in reference to the money received and unaccounted for by the Plaintiff, or whether the Defendant meant that the Plaintiff had actually *stolen* beer; for if they referred to the money not accounted for, that being a mere breach of contract, so far explained the word "thief" as to make it not actionable. Thus if a man says to another "You are a thief, for you stole my tree," it is not actionable

actionable (*a*), for it shews he had a trespass and not a felony in his contemplation.

The Jury found for the Defendant (*b*).

(*q*) *Cro. Jac.* 114. *Bull Nisi Prius*, p. 5. aside the verdict, and Sir *J. Mansfield*, Chief Justice, said, "The

(*b*) *Vide Penfold v. Westcott*, 3 *Bos. and Pal. N. R.* 335. in which "manner in which the words
case the court held that the word "were pronounced, and various
thief, spoken together with many "other circumstances might ex-
other words of general abuse, might "plain the meaning of the word,
be actionable or not, as the jury "and if the Jury thought that
should understand the intent of "the word was only used by the
the Defendant in speaking them. "Defendant as a word of general
The Jury having found for the "abuse, they ought to have
Plaintiff the court refused to set "found a verdict for the De-
"fendant."

ROE dem. HENDERSON v. CHARNOCK.

EJECTMENT for common field lands, by land-lord against tenant.

*The Defendant attempted to shew that it was the custom of the country to give a year's notice, to quit, whereas only half a year's notice had been given in the present instance.

Whether a year's notice to quit is necessary, if it has been the custom to give that notice. Qu.

[* 5]

Lord KENYON. I remember there was a cause some time ago where Lord *Mansfield* said that three months notice is sufficient under a special custom: after so great an authority it is too much for me, sitting at *Nisi Prius*, to say that under a special custom twelve months notice is not necessary. But there ought to be very strong evidence, and the witness must not speak to opinion, but facts.

The

The Defendant failing in his proof the lessor of Plaintiff had a verdict (*a*).

(*a*) *Fide* Mr. Justice *Wilmot's* *Roe* dem. *Brown* v. *Wilkinson*, argument, 3 *Burr.* 1609, and *Butt. Co. Lit.* 270 *b.* note 1. :

SLACK v. BUCHANNAN.

What admissions
may be given in
evidence,

THIS was an action for goods sold and delivered.

A witness was called, who had been an arbitrator between the parties, to prove the admissions which had been made by the Defendant when the cause was under reference. The reference had proved ineffective.

The Defendant's counsel objected to this evidence, alledging that these admissions were made by the Defendant in hopes of purchasing peace, and therefore ought not to be given in evidence against him.

[* 6] Lord KENYON. Hitherto I have made it a rule never to receive any admissions whatever, which were made *on a reference that was not effective. I think I have carried that rule too far, and I now wish it to be understood, that for the future I shall receive evidence of all admissions, such as the Defendant would be obliged to make in his answer to a bill in equity, and will reject none but such as are merely concessions for the purpose of making peace, and getting rid of a suit. These I think ought not to be admitted in

in evidence to prejudice the Defendant, when the object for which they were made is at an end (a).

(a) *Vide Bull. N. P.* [236.] ac- *Vern.* 717. 1 *P. W.* 497.
 cold. *Harman v. Van Hatton*, 2

CHARRINGTON v. MILNER.

ASSUMPSIT against the maker of a promissory note, at the suit of the indorsee.

In an action
 against the
 maker of a pro-
 mise note the
 indorsee
 need not
 prove he paid.

The note was indorsed by one *Monk* to the Plaintiff. The Defendant called *Monk* to prove that he had paid the money for which this note was indorsed to the Plaintiff.

This was objected to on the ground that a man shall not be permitted to invalidate his own security.

Lord KENYON at first doubted whether he could be examined or not, but afterwards said that this evidence not proving the note *originally* void, he was clearly a competent witness. Wherefore he was examined (a).

(a) See the cases cited in the note in page 118, which shew that no such distinction is now made; but that the witness is equally admissible to shew that the note was originally void, as he is to shew that it has been since satisfied; and as his evidence will not avail him in an action brought against himself, but some other person must then be called to prove the fact of payment, he is not liable to objection on account of interest. So if he had received money from the drawer to take it up, he would equally be a witness to prove the payment. See *Birt v. Kershaw*, 2 *East*, 458.

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER TRINITY TERM,

30 GEORGE III. 1790.

Tuesday, June
26th, 1790.
At Westminster.
A husband separated from his wife could maintain an action for criminal

BARTELOT *v.* HAWKER, Esq.

THIS was an action of trespass for criminal conversation with the Plaintiff's wife.

At the time the adultery was committed the Plaintiff and his wife were separated by articles made on account of quarrels which had previously taken place between them. These articles were dated 31st *May*, 1786.

Lord KENYON said, that if the parties were separated by mutual consent, at the time, he was of opinion that the husband could not maintain this action, for it was impossible he could receive any injury by losing

losing the society of a wife, whom he had already abandoned.

* *Eyre*, for the Plaintiff, said he believed that he should be able to prove a criminal conversation, or at least a seduction of the wife's affections by the Defendant before the separation: but if he should not, he requested his Lordship to save the point for the opinion of the Court, which his Lordship agreed to do. [* 8]

The Plaintiff proved a criminal conversation before the separation, upon which the Jury gave a verdict for the Defendant, damages £700 (a).

(a) *Vide* *Hodges v. Windham*, she could not be absent with the consent of the husband, and therefore that the case did not fall within that of *Weeden and Timbrel* (the only one cited) but Lord *Ellenborough* added, that he did not consider the question, "whether the mere fact of a separation between husband and wife by deed, was such an absolute renunciation of his marital rights as precluded the husband from maintaining an action for the seduction of his wife," as concluded by that case.

post 39. *Weeden v. Timbrel*, 5 T. Rep. 357. accord. But in *Chambers v. Caulfield*, 6 East. 244, the doctrine of these cases was considerably shaken, there the husband and wife having entered into a deed of separation, by which trustees were appointed, and the wife, during the time of their adulterous intercourse, living absent from her husband, though not pursuant to the terms of the deed, the trustees not having given their approbation to her departure; the court held that

Thursday,
July 1st.
At Westminster.

The KING v. RICHARD HAWKINS.

Where to an information in the Exchequer for having goods knowing them to have been run, the Defendant pleads *not guilty*, such plea only puts in issue the fact of Defendant's possession and knowledge, and if in stating the record, it is said, that the issue was *touching and concerning the forfeiture of the goods*, it is a fatal variance.

THIS was an indictment for perjury alledged to have been committed on the trial of an information in the Exchequer.

The indictment stated, that “ at the Sitting of *Nisi Prius* held &c. before the Right Honourable Sir *James Eyre*, Knight, Chief Baron &c. a certain issue before then duly joined, in a certain information before then exhibited by Sir *Archibald Macdonald*, Knight, Attorney General of our said Lord the King, who prosecuted, &c. between the said Attorney General, on behalf &c. and one *Luke Staveley* (the prosecutor of this indictment) *touching and concerning the forfeiture of certain goods and merchandizes imported from parts beyond the seas to Great Britain* by way of merchandize and unshipped to be laid on land before the customs and other duties * due to his Majesty for the same goods were first paid and secured, *contra formam statuti*, and also touching and concerning the forfeiture of the treble value of the same goods by the said *Luke Staveley*, for harbouring, keeping, concealing and having possession of the same, knowing they were run goods, &c. came on to be tried, &c.”

The information in the Exchequer was read. It stated, that “ certain merchants unknown did import, or cause &c. from parts beyond the seas into *Great Britain*, to wit at, &c. within the port of *London*, in a certain ship or vessel likewise unknown, by way of merchandize, two bales of *Ban-*

“ *dannoa* handkerchiefs, of the value &c. liable at
 “ the time of the importation thereof to the payment
 “ of customs and other duties; that they did after-
 “ wards unship them to be laid on land, before the
 “ customs &c. were paid, &c. by reason whereof they
 “ became forfeited, and being so forfeited, they came
 “ to the hands and possession of the said *L. S.* he at
 “ the said time well knowing that they were im-
 “ ported and unshipped &c. by reason whereof *he*
 “ *forfeited the said goods and merchandizes*, and
 “ £360. the treble value thereof.” There was a second count generally stating “ that the goods had
 “ been run into *Great Britain* &c. by reason whereof
 “ they became forfeited, and that the Defendant did
 “ knowingly conceal them &c. whereby he forfeited
 “ £360. the treble value of the said goods.” The
 prosecutor of this indictment had pleaded generally
 “ not guilty” to that information, and upon the trial a
 verdict was found against him for the penalty.

* *Erskine*, for the Defendant in this indictment, ob- [* 10]
 jected that the issue on the information was not truly
 stated in this record, for that the plea of not guilty
 did not put in issue the fact of the goods being
 brought over by persons and in ships unknown, but
 only the Defendant’s knowledge of their having been
 run. To recover the goods themselves on account of
 a forfeiture, the proceedings must be *in rem*.

Mingay, for the prosecution, answered, that the
 issue was truly stated, because in order to recover a
 verdict on that information, the Attorney General
 must have proved that the goods were forfeited, as
 well as the Defendant’s possession of them and know-
 ledge of their being smuggled.

BULLER J. (a). Though the Attorney General might, as Mr. *Mingay* observes, be obliged to prove the first part of the charge, either by witnesses, or a judgment on a prior information *in rem*, yet it does not follow that that was the matter in issue. It was only inducement. The only question put *in issue* by the plea of not guilty was, whether the Defendant had the goods in his custody knowing that they were smuggled into *England*.

His Lordship therefore directed an acquittal, which was found without entering into the merits.

(a) MR. J. BULLER sat to day for Lord KENYON.

[* 11]

* The KING v. TAYLOR.

Same day.

The proper question to be asked a witness in order to ground objection to incompetency is not whether he believes in *Jesus Christ* or the *Holy Gospels*, but whether he believes in *God* and a future state.

THE Defendant was indicted for conspiring with one *Peverel* and *Humphrey Tristram Potter* deceased, to ruin the credit of the prosecutors Messrs. *Parker*, (who were considerable glass warehousemen) and in prosecution of such conspiracy, publishing a libel in the newspaper called the *Morning Star*, purporting to be an advertisement for calling together the creditors of the said *Parkers*. The indictment contained a second count for publishing the libel.

The prosecutors called a witness of the name of *Smith*. Before he was examined, *Mingay* the Defendant's counsel, asked him whether he believed in *Jesus Christ*? But, on *Erskine*, for the prosecutor, objecting

objecting to the question, *Buller J.* over-ruled it, saying it should not be put.

Mingay then asked the witness, whether he believed in the *Holy Gospels of God*, on which he had been sworn? He answered, he believed them, as far as he could understand them.

Mingay insisted this was no answer to his question, and was proceeding in his examination, when

BULLER J. said, that this was not the proper question, and asked him whether he believed in *God*, the obligation of an oath, and a future state of rewards and punishments? and on his answering in the affirmative he was admitted.

Several persons were called to affect the character of this witness, and swore that, from what they observed of his conversation and manners, they would not believe him on his oath—And the Jury, not believing his testimony, found the Defendant not guilty.

* The KING v. DALBY.

THIS was an indictment against the Defendant for perjury alledged to have been committed on the trial of an action brought by *Abraham Greenwood* against the prosecutor for usury; in which action a verdict was obtained against the prosecutor on the evidence of the Defendant, *who was the only witness*. The first witness called was *Priestman* the prosecutor.

[* 12]

*Saturday, July 3,
At Westminster.*

The person who has been charged with a sum of money by the perjury of the *only witness* examined, and has filed a bill for relief, is not a competent witness on an indictment for that perjury, though he has since paid the money. *Ret v. Boston*, 4 East, 572. contra.

Law,

Law, 'for the Defendant, objected to him as an incompetent witness on account of his interest. He had filed a bill in the Court of Chancery against the Defendant and *Greenwood*, stating the perjury and that the verdict was obtained on that perjury, and praying an injunction. He said this case was similar to that of *The King v. Menetonè* at the Sittings after Trinity Term 1785. That was an indictment for perjury committed in an answer in Chancery to an injunction bill filed by the prosecutor. Mr *J. Buller*, who tried that cause, thought that the prosecutor was an incompetent witness, because by convicting the Defendant of perjury, the witness would certainly obtain a perpetual injunction.

Erskine said, he was counsel for the Defendant in that case, and perfectly recollected it. This case, he said, materially differed from it, for to this bill the Defendant had demurred; and, as to him, the bill was dismissed with costs, and since that time *the money had been paid* by the prosecutor.

Lord KENYON. This witness is certainly not competent to give evidence in this cause; as he is clearly
 [* 13] *interested in and may derive a benefit from the event of it, for should this Defendant be convicted, he being the only witness to support the verdict, the Court of Chancery, upon having this new matter stated in a new or supplemental bill, would order the money to be refunded.

He was therefore rejected, and the prosecutor not having an office copy of the proceedings in the former cause the Defendant was acquitted (*a*).

(a) The cases on this point are as a general rule, that in the case very contradictory. In *Watt's* of perjury he who is injured by case, *Hardr.* 331. it is laid down the perjury cannot be a witness; and

and in the case of *The King v. Whiting*, 1 *Salk.* 283. it was held that a woman who had been induced by the fraud of the Defendant to sign a note of hand, could not be a witness against him, *because* his conviction would influence the Jury on the trial of an action on the note, *though the record could not be given in evidence.* In the case of *The King v. Ellis*, 2 *Stra.* 1104. a Defendant in an ejectment was held not to be a witness on an indictment for perjury committed on the trial of such ejectment: and in the case of *The King v. Nunez*, 2 *Stra.* 1043. it was determined, that a person who had filed an injunction bill in the Exchequer to stay proceedings in an action brought on a promissory note could not be a witness to prove perjury committed in an answer to that bill. *Paris's* case, (1 *Ventr.* 49. and 1 *Sid.* 431.) is directly contrary to *The King v. Whiting*; the only difference between the two cases is, that one information was for fraudulently procuring a warrant of attorney to confess judgment, the other for so procuring a promissory note. And in *The King v. Moise*, (1 *Stra.* 595.) which was an indictment for tearing a note, the payee of the note was admitted to prove the case. The cases of *The King v. Whiting*, *The King v. Nunez*, and *The King v. Ellis*, are said by Lord Mansfield, in 4 *Burr.* 2255. to have been over-ruled by Lord Ch.

J. Lee in the case of *The King v. Broughton*, 2 *Stra.* 1229. and the rule laid down by Lord Mansfield in that book is, "that the question in a criminal prosecution being the same with a civil cause in * which the witness is interested, goes generally to the credit: unless the judgment in the prosecution, where he is a witness, can be given in evidence in the cause where he is interested." A distinction however may be made between the cases of *The King v. Whiting &c.* and the case of *The King v. Broughton*. In the first three cases the person who was called as a witness might have eventually have been benefitted, because in *The King* against *Whiting* the note was a good instrument till the Defendant was convicted. In the *King v. Ellis*, for aught that appears to the contrary, the Defendant in the ejectment failed at the trial, and he might hope to obtain a verdict in another ejectment if he succeeded in convicting the Defendant on the indictment for perjury, and in *The King v. Nunez* the suit in the Exchequer was still pending. In the case of *The King v. Broughton* the suit in Chancery was ended, and ended in the manner most agreeable to the interest of the witness, for the Chancellor not believing *Broughton* the Defendant in that indictment, had decreed for the witness, so that the witness could not have even the hope of benefiting himself by convicting *Broughton*.

[* 14]

The

The case of *The King v. D' Faria*, *post.* 104. is open to the same observation, and the following case clearly establishes the position laid down by Lord Mansfield in the case of *Abrahams* and *Bunn*. This however clearly overturns the case of *The King v. Whiting*, and cannot be distinguished from it. It was the case of *Bartlet v. Pickersgill*, and is cited by Lord Mansfield, 4 *Burr.* 2255. as follows: The Defendant bought an estate for the Plaintiff. There was no writing, nor was any part of the money paid by the Plaintiff. The Defendant articulated in his own name and refused to convey, and by his answer denied any trust. Parol evidence was rejected. And the bill was dismissed. The Defendant was afterwards indicted for perjury, tried at *Fork*, and convicted, *on the evidence of the Plaintiff*; confirmed by circumstances and the Defendant's declarations. The Plaintiff then petitioned for a supplemental bill in the nature of a bill of review, stating the conviction. But the petition was dismissed *because the*

conviction was not evidence. So in the case of *Smith* and *Prager*, 7 *T. Rep.* 60. the borrower of money was held a good witness to prove the whole case in an action for usury against the lender, and the authority of *Abrahams v. Bunn* fully recognized. The last case on the subject was that of *The King* against *Boston*, 4 *East.* 572. where the Defendant having been convicted of perjury in an answer to an injunction bill, and the Plaintiff in the bill and his wife having (after objection) been examined as witnesses on the trial, the Court of King's Bench decided that they were competent witnesses; because in no case where a person has been examined on the trial of an indictment can the verdict on that indictment be used for him. See also the case of *Smith v. Rummins*, *Campb. N. P.* 11. where a conviction obtained on the evidence of a person who was afterwards made Defendant in a cause, was on the authority of that case, determined by Lord *Ellenborough* not to be admissible evidence for him.

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER MICHAELMAS TERM,

31 GEORGE III. 1790.

MIDDLETON *v.* BREWER

*Friday, December 3d, 1790.
At Westminster*

ASSUMPSIT. The declaration stated, that the Defendant's son being indebted to the Plaintiff in a large sum of money, in consideration of the Plaintiff's forbearing to sue him for the same, Defendant promised to pay.

A promise to pay the debt of another need not be proved to be in writing when the Defendant pleads a tender to the count on such promise.

The Defendant pleaded the general issue to part, and a tender of the residue. The question was, whether the Plaintiff was obliged to prove an undertaking in writing.

Lord KENYON was clearly of opinion that he was not. By paying the money into Court on the plea of tender the Defendant had admitted the promise; this

was not as if there had been several counts, and the
 [* 16] * Defendant had pleaded the tender and paid the money
 into Court on some counts only; he had applied this
 tender to this count, and therefore the plaintiff was
 not obliged to prove the promise (a).

It appearing that more than sufficient to satisfy all
 just demands of the Plaintiff had been tendered, the
 Jury found a verdict for the Defendant.

(a) So in an action on a bill of exchange where the Defendant paid money into Court on the whole debt, the Court held that by so doing he had admitted the bill, *Gutteridge v. Smith*, 2 H. Blac. 374. And where in an action against a carrier for not safely carrying goods, he paid £5 into Court, it was determined that by so doing he had admitted the contract for the safe carriage, and the loss, but that he was still at liberty to shew that he was not liable beyond the sum paid into Court by proving a notice,

“ That no more than £5 would
 “ be accounted for, for any goods
 “ or parcels, unless entered as
 “ such, and paid for according-
 “ ly,” *Clark, v. Gray*, 6 East. 564. In a former case it had been determined. that by the payment of money into Court the Defendant had admitted the contract to the extent of being liable for the whole loss, and could not avail himself of a notice conceived in terms nearly similar, *vide Yate, v. Willan*, 2 East. 128. — *Peake's Evid.* [203] 215.

THIWAITES v. RICHARDSON.

In an action of
Assumpsit against
 one partner, evi-
 dence may be
 given of the ad-
 mission of ano-
 ther.
Comme semble.

THIS was an action for money paid, laid out, and
 expended, &c.

The Defendant was one of the proprietors of a
 public newspaper called the *Morning Star*. The
 Plaintiff had expended several sums of money in pay-
 ing the workmen employed in printing the paper, &c.

After proving the Defendant a partner in the paper,
 the

the Plaintiff offered to give evidence of the admission of another partner that the money was owing to the Plaintiff.

On this evidence being objected to, Lord KENYON said he thought that though in cases where an action is brought against several partners, the admission of any one might be given in evidence to prove all liable, yet when one only was sued, the admission of the other could not be given in evidence to charge him.

It was then proposed to release the other partner and call him, but the Plaintiff's counsel recollecting that by so doing they would discharge both, did not call him; and upon *Garrow*, for the Plaintiff, observing * that there was a case (a) in one of the books, where it had been held that the admission of one joint maker of a promissory note might be given in evidence to take it out of the Statute of Limitations in an action brought against the other alone. [* 17]

Lord KENYON said, he would receive the evidence with liberty for the Defendant to move the Court upon the question as to its admissibility (b).

The parties afterwards agreed to a reference.

(a) *Whitcomb v. Whiting*; *Dougl.* 652. See also *Jackson v. Fairbank*, 2 *H. Bl.* 340. where it was held that proof under a commission of bankrupt against one joint and several maker of a note was an answer to the Statute of Limitations in an action against the other.

(b) *Vide Grant v. Jackson*, *post* 203.

Monday, Dec. 6.

GANER v. Lady LANESBOROUGH.

On a replication that *A.* was not married to *B.*, proof that *A.* was married to another woman then alive, and therefore that he was incapable of contracting marriage, will maintain the issue.

DEBT on judgment.

The Defendant pleaded in abatement that she was covert of *John King*, and the Plaintiff, by his replication, traversed that plea. The Defendant proved her marriage to *King*; in answer to which the Plaintiff proved the marriage of *King* with a former wife, and that she was still living. This evidence was objected to as incompetent for the Plaintiff to give on this replication, which only traversed the marriage of *King* with the Defendant. But Lord *Kenyon* admitted it, saying, it proved that there was no marriage at all between the Defendant and *King*, he being unable to contract marriage with her.

The Defendant then offered to prove that *King* being a Jew and his former wife a Jewess, they were divorced at *Leghorn*, according to the rites and customs of the Jews there, and that after such divorce it was competent to either party to marry again.

The English Courts can take notice any judicial done in a foreign country, without evidence of the laws of such country.

[* 18]

*To prove this she produced an instrument under the seal of the Synagogue there, whereby they were divorced from each other. But Lord *Kenyon* held this to be no evidence, for before he could take notice of any proceeding in a foreign court, he must know the law of the country, which was matter of evidence, and should be proved by witnesses (*a*). *

(*a*) *Vide* 1 P. W. 431. accord.

The

The Defendant then called *King's* former wife to prove the divorce. She was objected to as an incompetent witness, but the objection being over-ruled, she swore (without producing any instrument), that she was divorced from *King* before the *Rabbi*, at *Leghorn* according to the ceremony and custom of the Jews there.

A Jewess may be permitted to give parol evidence of her own divorce in a foreign country according to the custom of the Jews there.

On this evidence the Defendant had a verdict.

POLLARD v. SCOTT.

Wednesday,
Dec. 10.

TRESPASS. Justification, the *locus in quo* being a highway.

It is no objection to the competency of a witness who comes to prove a highway, that he is the owner of an adjoining piece of land, and has let a road to *A.* at a certain sum of money per annum, which he cannot use unless the road is disputed be established.

A witness was called on behalf of the Defendant to prove his plea. He was asked, on the *voir dire*, whether he was not the owner of a field adjoining the *locus in quo*, and had not agreed with the Defendant to let him pass across that field at all times, he paying £6 a year for that privilege. He answered in the affirmative, and it appeared that the Defendant could not get to the road assigned by the witness, if the *locus in quo* were not a public road.

* *Erskine* contended that this was such an interest in the event of the suit as rendered him an incompetent witness, but Lord *Kenyon* over-ruled the objection, and he was examined.

[* 19]

A copper-plate map was produced, wherein this close was described as a public road; and the Plaintiff offered evidence to prove that it was generally received in the parish as an authentic map. It purported on the face of it to be taken by the direction of the churchwardens of that time.

A copper-plate map taken by the direction of the overseers of a parish is no evidence in an issue whether a particular spot of ground is a highway or not.

Lord KENYON refused to receive this evidence, saying, that it would be equally improper to admit it as to admit a plan taken by the Lord of a manor, who might thereby crush and destroy the estates of his tenants (a).

(a) *Vide Sir John Bridgman v. Jennings*, 1 Lord Raym. 734. Peake, L. Evid. [89.] 91.

KOOPES v. CHAPMAN and Another.

A creditor is a witness to prove an act of bankruptcy if he releases to the assignees.

THIS was an action of trover. A commission of bankrupt had issued against the Plaintiff, and the Defendants had seized the goods thereunder.

The Defendants admitted that they had seized the goods, and to prove that the Plaintiff had committed an act of bankruptcy *they* called a creditor who had released to the assignees.

Mingay, for the Plaintiff, objected that this release would not make him a competent witness. At present it did not appear that the assignees had any interest in the estate of the Plaintiff, and therefore they could not take a release.

[* 20] *Lord KENYON. This makes him a good witness to prove the bankruptcy. If the commission is established the release stands good; if not, the Plaintiff is not released, nor has it any operation (a).

(a) *Vide Ambrose v. Clendon*, Cas. temp. Hardw. 267. accord.

MACFERSON v. THOYTES.

Friday, Dec. 12.
At Guildhall.

ASSUMPSIT on a bill of exchange, indorsee against acceptor, the bill was drawn by one *Parry* payable to his own order, and the name of *Parry* was indorsed on it.

Comparison of hands is not evidence in civil any more than in criminal cases (a).

The Plaintiff proved the hand-writing of all the indosers except the first.

The Defendant's counsel insisted that this should also be proved.

It was answered, that the acceptance was an admission of the hand-writing of the drawer; and that by comparing that hand-writing with the *indorsement*, they would be found to correspond.

LORD KENYON. Comparison of hands is no evidence. If it were so, the situation of a Jury who could neither write nor read would be a strange one, for it is impossible for such a Jury to compare the hand-writing.

The Plaintiff was therefore called. (b)

Vide Strange v. Searle, Espinasse 14, accord'.

(a) But in cases of forgery a *literate* Jury may compare the forged instrument with other papers in the Defendant's hand-writing, *Allesbrook v. Roach*, *Sittings at Westminster* after *Trin. Term*. 1795, M. S. *Vide Beake Law Evid.* [104]. 107.

support of a *modus*, produced in evidence a paper said to be under the hand of the deceased * Rector, being a particular of tythes, &c. In order to shew that this was the writing of the deceased Rector whose name it bore, the Plaintiff's counsel offered to produce many of the returns to the Spiritual Courts of births and burials made in the time of that Rector, and signed with his name, and upon comparing this entry with those returns,

[* 21]

(b) **BROOKBARD v. WOODLEY** clerk, *Coram Yates Just.* at *Worcester Spring Assizes*, 1770. In prohibition, the Plaintiff in

returns, it was said it would appear, that the hand-writing was the same. The Rector had been dead many years.

YATES J. I have no doubt to reject this evidence as not admissible, I do not know any case where comparison of hands has been allowed to be evidence at all. No trial can be decided by opinion and speculation, but by evidence. Where a witness has seen the party write and speaks to his belief, of that writing which is produced in evidence, bring the party's hand-writing, that is evidence. But where it is merely opinion on similitude of the writing collected from barely comparing them, the Jury may compare them as well as any body else, and any two people

may think differently. In an indictment for forgery, the evidence of a person who has seen the party write is sufficient. The case now in question is not like a rental, terrier, old title deeds; these are received without evidence of hand-writing, because of the *place* they come from, which gives them authenticity. Suppose some of the Jury cannot read or write, how are they to judge of the similitude of hands. I have no doubt but this evidence must be rejected.

In a case circumstanced like this *Lord Hardwick* permitted a witness, who had examined the parish books, to swear to the similitude of the hand-writing. See *Bul. N. P.* [236.]

EVANS v. SILVERLOCK.

In an action brought by one partner, another may be called to prove the debt paid to him.

ASSUMPSIT for goods sold and delivered.

The Defendant's counsel stated that the Plaintiff and one *Morgan* were in partnership together, and that on a dissolution of that partnership it was agreed between them, that *Evans* should receive some of the debts, and *Morgan* the * others. This debt was to be paid to *Morgan*, and the Defendant had accordingly paid

paid it to him. They called *Morgan* to prove this case.

Bearcroft objected, that he was not a competent witness.

Lord KENYON said, he was, as the judgment in this cause could not conclude his right. He was examined, and on his evidence the Defendant obtained verdict.

CHARTER One, &c. v. BARRET.

Monday, Dec.
13. At Guildhall.

CASE for words spoken of Plaintiff in his profession of an attorney.

Words spoken at different times may be given in evidence on one count.

There was but one count to which the words applied, and the Plaintiff gave evidence of the same words spoken at different times.

This was objected to by the Defendant's counsel.

Lord KENYON said, that though these words were spoken at different times, they might be given in evidence on this one count to shew the malice of the Defendant (a).

(a) *Vide Mead v. Daubigny*, post 125, and *Lee v. Huson*, post 166.

* MEE v. REID.

[* 23]

ASSUMPSIT on a bill of exchange.

The Plaintiff's case being proved, the Defendant called a witness, who was a *Scotchman* and a member of

A member of the kirk of Scotland may be sworn without kissing the book.

of the kirk; he refused to kiss the book, and insisted on holding up his hand.

An objection was made to this mode of administering the oath, and Lord *Kenyon* was at first inclined not to permit him to be sworn in this form, but at length determined to receive his evidence under the sanction of an oath so administered.

Accordingly he held up his right hand and repeated the oath after the crier (*a*).

(*a*) *Vide Leach's Crown Cases* 348, *Mildronc's case*. *Peake's Law Ev.* [141.] 148.

Tuesday, Dec. 14.

FASSET and Another v. BROWN.

If the name of a fictitious person be put as a subscribing witness to a deed, proof of the party's hand-writing is sufficient.

DEBT on a bond entered into by the Defendants as sureties for *George Russell*, clerk to the Plaintiffs.

The Defendant pleaded *non est factum*, and that *Russell* had duly accounted.

The Plaintiffs proved that the Defendant brought the bond to the Plaintiffs' counting-house, subscribed with two names as witnesses to the execution of the bond by him: that on enquiry it appeared that no such persons as those whose names were subscribed as witnesses were in existence.

[* 24] * Lord KENYON then said, that the Plaintiff was at liberty to give evidence of the Defendant's hand-writing, and the bond was so proved.

But there being a variance between the date of the bond and the statement of it in the declaration, the Plaintiffs were nonsuited (*a*).

(*a*) *Vide Grellier v. Neale and Others*, post. 147.

SCHOLEY v. WALSBY.

ASSUMPSIT on a bill of exchange drawn by the Plaintiff on the Defendant, and accepted by him.

An acknowledgment of having received the acceptance of a bill of exchange is a receipt for money within 23 G. 3. and liable to the stamp duty imposed by that act on such receipt.

The Defendant pleaded a set-off for money paid by him to the Plaintiff's use, money had and received by the Plaintiff for his use, and for money lent by him to the Plaintiff.

In support of his case he offered to read in evidence a paper signed by the Plaintiff written in the following words:—

“ *London, Decem. 22d, 1789. Received of Mr. Walsby, his acceptances for £200, due Feb. 20th and 25th, out of which Mr. Walsby has my acceptance for £60, the difference I am to make up by the said time of payment.*

“ *£ 60 on one for 25th of February.*

“ *£140 I promise to provide.*

“ *£200*

Wm. Scholey.”

* This was objected to as no evidence, not being stamped. The Plaintiff's counsel contended it ought to be stamped either as a receipt or a promissory note for £140. [* 25]

Lord KENYON was of opinion it ought to have been stamped as a receipt, for if such a paper as this were to be admitted as evidence without a stamp, it would put it in the power of any person to evade the act of parliament in almost every case, by paying in notes or bills.

The

The Plaintiff produced the bill, which had a receipt on the back of it, as being paid to a person who was at that time the holder of it.

A general receipt on the back of a bill of exchange is *prima facie* evidence of its having been paid by the acceptor, and will not of itself be evidence of a payment by the drawer though it is produced by him.

LORD KENYON. *Prima facie* the receipt on the back, imports that it was paid by the acceptor: for aught I know to the contrary the Plaintiff and Defendant may have since settled their accounts, and this bill may have been delivered up on such settlement. It must therefore be explained before I can receive it as evidence of the bill having been paid by the drawer.

The Plaintiff, not having any witness to prove that the bill had been paid by him, was nonsuited (a).

(a) In *Smith v. Kelly*, sittings at viz. "settled by two bills, one at Westminster after Hilary Term 43 nine, and the other at twelve Geo. 3. the Defendant offered in months;" and Lord Ellenborough evidence a bill of parcels of the held this an acquittance, which goods delivered, to which was could not be evidence until subscribed the following words, stamp.

Wednesday,
Dec. 15.

THORNTON v. The ROYAL EXCHANGE ASSURANCE COMPANY.

A ship builder may be called as a witness to give his opinion as to the sea worthiness of a ship, on the facts stated by others.

THIS was an action of covenant on a policy of assurance on a ship from the *Grenades* to *London*.

* The ship struck upon the bar, as she was entering *Grenville Bay*, and received an injury thereby, for which the present action was brought.

She was afterwards surveyed and repaired. The Defendants contended she was not sea-worthy; and offered

offered to call Mr. *Mestair* an eminent shipbuilder, to prove that from what appeared on the survey which had been made, but at which he was not present, it was impossible in his opinion, that the ship could be sea-worthy when the policy was effected.

Erskine for the Plaintiff objected to this evidence. He said that had the persons who made the survey been called, he should object to any question as to their opinion; the objection against this evidence was much stronger; the surveyors are not obliged to state on their survey all the circumstances on which they ground their opinion, and the witness can only judge from what is contained in the survey.

LORD KENYON. This evidence is certainly admissible. Lord *Hardwicke* used often to be assisted by the Brethren of the Trinity House, in causes of this nature.

The Defendants not making out their case, the Plaintiff had a verdict (a).

(a) *Vide Chaurand and Another v. Angerstein*, post. 43.

*ROBERTS and Others Assignees, &c. v. TEASDALE. [* 27]

TROVER for Cotton.

The Plaintiffs were assignees under a joint commission against *Cook* and *Kilner*, and having proved the trading, act of bankruptcy, &c. Mr. *Crowder*, the Solicitor under the commission, was called to prove the assignment to the Plaintiffs. On his cross examination

Though a trader deny himself for the express purpose of becoming a bankrupt such denial will amount to an act of bankruptcy, if made without the knowledge of, or any previous concert with the petitioning creditor.

nation he said; that there having been two meetings of the bankrupt's creditors, and they being found insolvent; the bankrupt *Kilner* called on him to ask him what was best to be done. He told *Kilner* that the most advisable thing he could do was to commit an act of bankruptcy by denying himself to a creditor, which he accordingly did. He added, that this advice was given without the knowledge of the petitioning creditors, or any desire from them, though they had before desired him to take out a commission.

The Defendant's counsel contended, that this was such a concerted act of bankruptcy, as would not support a commission.

LORD KENYON. The distinction in these cases is very nice. It does not appear that there was any intention to commit a fraud in this case, either by the bankrupt or the petitioning creditor. In this respect it differs from those cases in which concerted acts of bankruptcy have been held to be fraudulent, and the commission grounded upon them void. Here was a desire to make an equal distribution of the bankrupt's effects, and the advice was the most beneficial which
 [* 28] * could have been given for all parties. His Lordship however added, that he was not entirely free from doubt on the case.

The Defendant's counsel pursued their cross examination, and Mr. *Crowder* said, that at the meetings, an assignment for the benefit of the creditors, was offered, but the creditors insisted on having a commission taken out.

LORD KENYON thought that this circumstance materially altered the case, but wished the Jury to find a verdict

verdict for the Plaintiff subject to the opinion of the Court on this point.

The Jury found for the *Defendant*.

In the following term a motion was made for a new trial, and after hearing counsel on both sides, the court made the rule absolute.

On that occasion both Lord *Kenyon* and Mr. J. *Buller* said that they thought the evidence of Mr. *Crowder* did not prove this to have been a concerted act of bankruptcy. His evidence is positive that he had no communication with the creditors on that subject. He gave the advice to the bankrupt as a friend to him, and to the creditors in general, and not for the purpose of making a fraudulent bankruptcy. It was an honest advice and for the benefit of all parties.

GROSE J. The evidence of Mr. *Crowder* is that this advice was given entirely from himself, without any desire of the creditors, or even their knowledge. It is ridiculous to say that it is a *concerted* act of bankruptcy (a).

(a) *Vide Hooper v. Smith*, 1 *Black. Rep.* 441. *Bromley v. Munde*, *Bull. N. P.* 39. *Coxley and Another v. Hopkins, Co. Bank.* L. 102. *Eyre and Another Assignees v. Birbeck and Another.* 2 *Term Rep.* 595, n. (a).

CASES IN K. B.

AT THE SITTINGS

AT NISI PRIUS,
AFTER HILARY TERM,

31 GEORGE III. 1791.

SHAW v. WHITEMAN.

*Thursday,
Feb. 17th, 1791,
At Westminster.*

In an action of *assumpsit* on an express promise to pay for the maintenance of a bastard child, of which the Defendant was the putative father, it is no defence that he has since discovered that the child was not begotten by him.

INDEBITATUS *assumpsit* for board, &c. found and provided by the Plaintiff for a child at Defendant's request.

The Plaintiff proved that she being delivered of the child for whose maintenance the action was brought, and the Defendant believing the child to be his, agreed that she should provide all necessaries for the child, and that he would pay her 7s. a week. The Defendant continued to pay that money until the month of *August*, 1788, when he refused to pay any further allowance whatever. The Plaintiff had not sworn the child to the Defendant before a magistrate.

The

The Defendant admitted the case proved by the Plaintiff, but offered to prove, that the reason of his refusal to pay the allowance, was that he had discovered that the child was not his, but that one *Farrer*, with whom the Plaintiff had also been connected, was the father of it. His counsel contended, that by proving this fact, they should shew there was no consideration for the promise, and that it was therefore void.

Lord KENYON was of opinion that this evidence could not be received on the present issue. The Jury could not here try who was the father of this child, but must confine themselves to the contract. If the child was not the Defendant's he might relieve himself by applying to a magistrate for an order of filiation. Under this direction the Jury gave a verdict for the Plaintiff.

On *Saturday* the 14th of *May* in the following Term, *Mingay* moved for a new trial, but the Court refused even a rule to shew cause.

BRETON v. COPE, Executor.

DEBT on a bond of the Defendant's grandmother (who was the Plaintiff's mother) conditioned for the payment of £1000 and interest.

Pleas *non est factum*, *solvit ad diem*, and *solvit post diem*.

The Defendant called a broker to prove that he, as the broker of the testatrix, had transferred £20,000 stock to the Plaintiff.

Parol evidence cannot be given of the transfer of stock, but copies from the books of the Bank must be proved
Marsh v. Colnet,
2 Esp. 665, 3, P.

Lord KENYON. This is not admissible evidence, to prove the transfer, copies from the books of the Bank should be proved (a).

An instrument executed in the presence of a subscribing witness cannot be proved by any other person, even after it is cancelled.

The Defendant then offered to prove this fact by the production of a deed whereby the Plaintiff assigned the dividends of the stock to the testatrix for her life; the assignment to him was recited in this deed. The subscribing witness was not in court, but the deed having been cancelled, *Erskine*, for the Defendant contended that any other person might be permitted to prove it as well as the subscribing witness, because all its force and power as a legal instrument was at an end, and it was only produced as evidence of the Plaintiff's admission of a fact.

Lord KENYON was clearly of opinion it could not be read unless proved by the subscribing witness.

The Defendant then proved an acknowledgment of the Plaintiff that he had received this money.

A transfer of stock is evidence on a plea of payment to an action on a bond.

Mingay, for the Plaintiff, contended that this evidence did not support either of the pleas of payment, unless it was expressly shewn that the stock was transferred for the purpose of satisfying this debt, but Lord *Kenyon* being clearly of a contrary opinion, the Plaintiff proved that the £20,000 stock was intended by the testatrix as a gift to him.

Lord KENYON. It has been a thousand times decided, that where a debtor gives a legacy to his creditor, it shall be considered as payment of the debt. And the gift of £20,000 stock was surely a good payment of a debt of £1000.

The Defendant had a verdict.

(a) *Vide Dougl. 572; note 3.*

STANDEN v. STANDEN and Others (a).

Tuesday,
Feb. 2d.
At Westminster.

CHARLES Miller, by his will, gave a sum of £200 to Charles Miller Standen and Caroline Elizabeth Standen (two of the Defendants), to bind them out apprentices. The rest of his fortune he gave and bequeathed "to the legitimate children of Charles Standen," father of the Defendants.

A man who has been in fact married, may be a witness to prove such a marriage illegal.

A bill was filed in the Court of Chancery by the Defendants against the executors of Charles Miller's will; and upon the hearing of the cause the Lord Chancellor directed this issue to try whether the Plaintiff was the lawful issue of Charles Standen.

The Plaintiff called his mother, who proved that she was married to Charles Standen the father, on the 4th of August, 1755, at the chapel of the Savoy. That they cohabited together, and that the Plaintiff was born in that wedlock. That having lived five years together, they parted, and had not cohabited since.

The Plaintiff also proved the register of the marriage, where it was entered, that the marriage was celebrated by banns; but no witness's name appeared. In answer to a question, whether any banns were published, the mother said she had no other knowledge of the fact than having been told so by Charles Standen (b).

(a) This cause was first tried marriage to prove the publication of banns. *Rex v. St. Devereux*, Burr. S. C. No. 162. 1 Blac. 367. 1789.

(b) It is not necessary for the party who wishes to establish the *S. C.* See also *Wilkinson v. Payne*, 4 Term Rep. 468.

The Plaintiff also called a witness to prove that he had been told by the clerk (since deceased) that the banns were duly published.

Lord KENYON said that this might be received as evidence of the general reputation, though not of the particular fact.

The Plaintiff then proved some circumstances to corroborate the marriage, such as *Charles Standen* having demanded the first witness as his wife, when her relations kept her from him, &c.

The Plaintiff having closed his case, the Defendants called *Charles Standen* the father.

Erskine asked him, whether the marriage ceremony was not in fact performed at the *Savoy* chapel; whether they both consented to the celebration of that marriage, and lived together as man and wife in consequence of it; and whether the Plaintiff was not his child by the woman he had so married. He answered in the affirmative. Whereupon *Erskine* objected that having acknowledged that a marriage ceremony had taken place, and that a cohabitation had also taken place under the sanction of it; he ought not to be permitted to prove that the ceremony was a mere farce, contrary to the obligation he had solemnly entered into at the altar.

But Lord *Kenyon* thinking the objection did not go to his competency though it would much affect his credit, he was examined.

He swore that the banns were not duly published three times. Being asked the reason of their not having been so published, he said that he had been

[* 34] * told by *Wilkinson*, the clergyman, that a friend of the

the wife's forbade them the second time they were published.

On this being objected to, Lord *Kenyon* said it was not admissible as a fact, but as evidence that *Wilkinson* had confessed he had married without banns.

The subsequent marriage of *Charles Standen* was also proved, and that the Defendants were the issue of such second marriage.

LORD KENYON. In order to constitute a legal marriage by banns, they must be three times published on three several days. All the directions of the act of parliament (c) need not be complied with, the form prescribed by the act is merely directory, and need not be strictly followed (d). If the substance is followed it is sufficient. If the entry in the register was not truly stated, the clergyman was guilty of felony, and he put himself in a dangerous situation by making such a confession as that stated by the witness *Charles Standen*. His Lordship made some further comments on the evidence of *Charles Standen*, and left the cause to the Jury on the credit they thought proper to give to him.

The form of words prescribed by the Rubrick for the publication of banns need not be precisely followed, this part of the act of parliament being merely directory.

The Jury found for the Plaintiff.

(c) 26 Geo. 2. c. 33.

(d) *Vide Reed v. Passer and Others, post 231.*

Wednesday,
Feb. 23d,
At Westminster.

LICET and Another, Assignees &c. v. REID, Esq.
and Another.

If *A.* be indicted for felony, and the Judge who tries the cause before whom the information was laid to retain the goods in his possession, until it appears who is entitled to them, it is not necessary to give such Justice a month's notice previous to commencing an action against him for the conversion of them.

TROVER for goods.

Loy the bankrupt, became acquainted with a woman and cohabited with her as her husband for some time, when they parted: and she being absent from the house in which they lived, he took the goods in question out of it, and conveyed them away. She afterwards indicted him at the Old Bailey for feloniously stealing these goods, and on the trial of that indictment he was acquitted.

But Mr. Justice *Buller* (before whom that indictment was tried) having doubts to whom the goods belonged, ordered them to remain in the hands of the Defendant *Reid*, who was the Justice of peace that had taken the information, till such time as it should be ascertained who was the right owner of them.

This action was brought by *Loy's* assignees to recover the goods, and they proved a notice to the Defendant a month prior to the suing out the writ, but this action was not commenced within six months after the goods came into his possession.

On an objection being made that the action could not be maintained, Lord *Kenyon* said he did not think any notice necessary in this case. These goods did not come to the Defendant's hands in his character of

a ma-

a magistrate, but as a trustee for the parties, and therefore the case was not within the statute (a).

The trading not being proved the Plaintiffs were nonsuited.

(a) 24 Geo. 2. c. 44. *Vide Feltham v. Terry*, Bull. N. P. 24. *Irving v. Wilson*, 4 T. Rep. 485. *Greenway v. Hurd*, *ibid.* 533. *Daniel v. Wilson*, 5 T. Rep. 1. *Castle v. Burdit*, 3 T. Rep. 623. *Peake's Evid.* [401]. 431.

BISSET v. CALDWELL.

TRESPASS for breaking and entering the Plaintiff's house, expelling him therefrom, seizing his goods &c. The Defendant pleaded the general issue.

Wearing apparel
may be distrained
for rent.

The defence was that the Plaintiff had taken lodgings, ready furnished, of the Defendant, at the rent of four guineas *per* week; and rent being in arrear the Defendant distrained the Plaintiff's wearing apparel, which were in the lodgings. The Plaintiff's counsel insisted that these could not be taken as a distress (a).

LORD KENYON. This has long been a *verata quæstio*, but I think they would now be held to be the subject of a distress. The same reason does not now exist, as formerly, when *averia caruæ* &c. could not be taken by the common law, because the things distrained being then taken only as a pledge, it was considered that the person losing those things was

(a) *Vide 2 Inst.* 132.

rendered incapable of earning money to pay the debt, and unserviceable to the commonwealth (*b*).

It being proved that the Defendant had expelled the Plaintiff by force from his possession of the rooms, he had a verdict and 1*s.* damages, but Lord *Kenyon* said it was so shameful an action that he would certify under the 43d *Eliz.*

(*b*) In *Hutchins v. Chambers* poor rate, and Lord *Mansfield* and Others, 1 *Burr.* 579. it was gave the same reason as that held that *averia carucæ* might be above given by Lord *Kenyon*, See distrained for non-payment of a also 3 *Salk.* 136.

The KING v. JONES.

A recital that an issue came on to be tried, is supported by evidence that an information containing several counts to each of which the general issue was tried.

THIS was an indictment for perjury, committed on the trial of an information in the Exchequer against one *Samuel Samuel*, for importing goods contrary to the Revenue laws.

The indictment stated the information &c. It then stated "that such proceedings were had that an issue was in due manner joined, and afterwards on &c. came on to be tried, and was tried by a Jury of the country &c." On reading the information it appeared that it contained two counts, and that the Defendant had pleaded the general issue "to each count separately.

Erskine, for the Defendant, objected that this was not a true recital. The information in the Exchequer

quer is not an information where there is *an* issue joined, but one in which *two* issues are joined. There * might be another information in the Exchequer, on the trial of which this perjury was committed. He was sworn to give evidence on the trial of *two* issues. [* 38]

LORD KENYON. I should have thought the converse of the proposition would have held. Had the indictment stated that the perjury was committed on the trial of two issues when there was but one, it would have been fatal, but I do not think that this is any variance.

The witness who had taken down the Defendant's evidence proved the words on which the perjury was assigned, but could not speak to any other part of his evidence.

In an indictment for perjury committed on the trial of a former cause the prosecutor should be prepared to prove the *whole* of the Defendant's evidence.

LORD KENYON. The whole of the Defendant's evidence on the former trial should be proved, for if in one part of his evidence he corrected any mistake he had made in another part of it, it will not be perjury. Courts have gone so far as to determine, that where a mistake has been committed in answer to a bill in Chancery, if the Defendant set it right in a second answer, it will save him from the perils of perjury (*a*).

His Lordship therefore directed the Defendant to be acquitted (*b*).

(a) The *King v. Carr*. 1 Sid. 418.

(b) *Vide Rex v. Dowlin*, post. 170

HODGES, Esq. v. WINDHAM, Esq.

In an action for adultery, proof that the husband willingly suffered his wife to live in a state of prostitution goes to bar the action, and not merely to mitigate the damages.

TRESPASS for criminal conversation with the Plaintiff's wife.

The Plaintiff and his wife parted on the 8th of *August*, 1789, and articles of separation were then executed by them. After which the criminal connexion, which was the subject of this action, took place.

Bearcroft, for the Defendant, objected that the action could not be supported.

Lord *KENYON* said it was a question that he had entertained considerable doubts upon, but that he was inclined to suffer the cause to proceed, and take a note of the objection, that it might be brought before the Court.

The Defendant proving that the Plaintiff had, before his separation from his wife, voluntarily permitted other men to have criminal connexions with her, Lord *Kenyon* said it was not to be endured that a man should suffer and encourage his wife to live in a state of prostitution, and then come into a court of justice to ask damages. His having suffered such connexion with other men was equally a bar to the action as if he had permitted the present Defendant to be connected with her, for such a husband could have none of that social affection for his wife, the loss of which is the ground of this action^(a). Verdict for the Defendant.

(a) *Vide Smith v. Allison*, *Bull. N. P.* 27. and *Duberley v. Gunning*, 4 *T. Rep.* 651. accord.

PHETHEON v. WHITMORE.

Friday, Feb.
25th.
At Guildhall.

ASSUMPSIT on a bill of exchange drawn by *Rayner* in favour of the Plaintiff, and accepted by the Defendant.

The Defendant offered *Rayner*, the drawer, as a witness to prove that the acceptance was conditional, and that the Defendant was not to pay the bill unless he should receive a sum of money due to *Rayner*. That the Plaintiff knew of this condition, and that the money had never been paid to the Defendant.

Erskine contended that he was an admissible witness. On the point of interest no objection could be made to him, for immediately that he defeated this action he made himself liable as drawer, by shewing that this bill was never any satisfaction of the debt owing from him to the Plaintiff. The only remaining objection was against his invalidating his own security. This is not like the case of a man coming to shew that the bill was originally void; this witness will only prove that the subsequent condition on which the payment was to depend was not performed. He mentioned a case of *Gardner v. Carter*, which, he said, was exactly like the present.

BULLER J. (who sat for Lord *Kenyon*) said he thought that this witness was not admissible, as his evidence tended to blow up the bill.

Erskine said there was a difference of opinion among the Judges on this point; my Lord *Kenyon* had taken * the distinction between a party to the bill coming to prove it bad in its creation, or avoided on account

Quere. Whether a party to a negotiable instrument can, in any case be admitted as a witness to invalidate it? It is now settled that he may, vide *Jordan v. Lashbrook*, 7 T. Rep. 601. and the note on the case of *Adams v. Linsgard*, post 118.

account of some subsequent act (a); though some of the other Judges had thought differently.

Upon this Mr. J. Buller said he would, to prevent the cause coming to trial a second time, admit the testimony of *Rayner*, subject to the correction of the Court: though at the same time his own opinion was that he was not an admissible witness.

The witness not proving the case opened, the Plaintiff had a verdict (b).

(a) *Vide Charrington v. Milner, ante 6.*

(b) *Vide 3 T. Rep. 36. Adams v. Lingard, post 117, and cases there cited.*

DUNMORE v. TAYLOR.

If A. agree to make a waggon for B. and make it accordingly, but refuse to deliver it unless the money is paid on delivery, the money which was to be paid for the waggon may be set off to any demand of B. against A. as goods bargained and sold. *Comm. 466.*

ASSUMPSIT for goods sold and delivered. Set off for goods sold and delivered, and also for goods bargained and sold.

On the cross examination of the Plaintiff's witness it appeared that the Defendant had made a waggon for the Plaintiff, but had refused to deliver it unless the Plaintiff would get some person to join him in giving a security for the balance which the delivery of the waggon would make in his favour. The Plaintiff was then insolvent.

It was objected that this contract being only executory, could not be made the subject of a set off.

[* 42]

* BULLER J. thought it could be set off as goods bargained and sold. When the cause had proceeded further,

ther, it appeared that it was afterwards agreed that the Plaintiff should not have the waggon, but that the Defendant should keep it. Upon which the Plaintiff had a verdict.

Note. After the cause was over Mr. J. Buller said that he thought an *indebitatus assumpsit* would lie in this case, but that there was some nicety in the question (a).

(a) The doctrine of Mr. J. Buller in this case is consistent with what was afterwards determined by Lord Kenyon in the following cases:

HANKEY v. SMITH,
K. B. *Sittings at Guildhall, after*
Easter T. 36 G. 3.
Indebitatus assumpsit for goods
bargained and sold.

The Plaintiff, through the intervention of a broker, sold for the Defendant a quantity of hogs bristles and feathers, which the Defendant was to fetch away from the Plaintiff's warehouse on a subsequent day, but on the Plaintiff offering the feathers to him, he refused to have them on account of their being damaged by the moth, insisting that he had agreed for the purchase of a merchantable commodity; and to resist the present action called a witness who swore that such was the contract between the parties. The Plaintiff's broker on the other hand swore that he sold them with all faults; and the Jury giving credit to his evidence, found a verdict for the Plaintiff.

The Plaintiff's counsel insisted that they were entitled to consider these goods as the property of the Defendant, and of course to recover the sum for which they were sold; but the Defendant's counsel contended that the Defendant having refused to complete his contract, the Plaintiff must keep the feathers and recover such damages as the Jury should think him entitled to for the breach of contract. They suggested that this action was misconceived, for that until delivery of the goods it was an executory contract, and therefore that the Defendant should have been charged in a special action for not accepting the goods and completing his contract.

Lord KENYON over-ruled the last objection, but as to the quantum of damages his Lordship was at first inclined to think that the Jury ought to give the Plaintiff only such damages as he had sustained on account of the Defendant's refusal to receive the commodity, but he afterwards was of opinion that the Plaintiff had

had his election either to call on the Defendant in a special action on the case for not fetching away the goods, or to consider the contract as complete the moment that the sale was made, and bring an action of *indebitatus assumpsit*, for the sum at which they were sold, for no further act was to be done by the Plaintiff, the goods were bargained and sold immediately the contract was made.

The Jury accordingly found for the Plaintiff to the full value of the goods.

Erskine and Lawes for Plaintiff.

Garrow and Marryatt for Defendant.

HORE v. MILNER,
K. B. Sittings at Westminster,
after East. T. 1797.

Assumpsit for not taking away a quantity of potatoes sold by the Plaintiff to the Defendant. The first count of the declaration stated a promise by the Defendant to take away the potatoes in a reasonable time, and the declaration also contained counts for goods bargained and sold.

It was proved that the Defendant agreed to take away the potatoes in a month, but that he failing to complete that contract the Plaintiff resold them to another person. On an objection being taken to the declaration on account of the variance between the first count and the case proved, the Plaintiff's counsel

contended that they had a right to recover under the count for goods bargained and sold.

But Lord KENYON held that the Plaintiff having resold the commodity, had by that act abandoned his right to insist on the Defendant taking the goods, he had not considered them as the property of the Defendant, or the contract as completed, and therefore could only recover damages for the breach of the agreement, and as he had no count agreeable to that case, directed a nonsuit.

Erskine and Best for Plaintiff.

Gibbs for Defendant.

In the case of *Goodall v. Skelton*, 2 H. Blac. 316, the Plaintiff agreed to sell a quantity of wool to the Defendant; a shilling earnest was paid to bind the bargain, and the wool was packed in cloths furnished by the Defendant for that purpose, and left at a hovel belonging to the Plaintiff, to which place the Defendant was to send his waggon to fetch it away in a few days; but while the Defendant's servant was weighing and packing it, and proposing to the Plaintiff to fix the hour when the waggon should come, the Plaintiff declared that it should not go off the premises till he had the money for it. The Court held clearly that there was no delivery in this case so as to enable the seller to maintain an action for goods sold and delivered.

GORHAM and Another v. THOMPSON and
Another.

Tuesday,
March 1st.
At Guildhall.

ASSUMPSIT. One of the Defendants had suffered judgment by default.

The Defendants had been partners about seven years since, and had dissolved that partnership, but no notice of the dissolution had been inserted in the *Gazette*, nor did the Plaintiff know of it, but thought they were dealing with both Defendants. But it appeared that the dissolution was generally known in the neighbourhood.

When partners dissolve their partnership it is incumbent on them to publish the dissolution in the *Gazette*, or they will be all liable to an action at suit of a creditor who did not know of the dissolution, and delivered goods to one thinking he was dealing with all.

Lord KENYON said, to discharge the partner retiring from the partnership there must be a public advertisement in the *Gazette*, or at least the dissolution must be notorious to the public, and actual knowledge of it brought home to the creditor. It would be the hardest measure imaginable upon the creditor were * the law otherwise, for while he supposed he was giving credit to a man having sufficient to satisfy the whole of his demand, he might be trusting a beggar.

[* 43]

Verdict for the Plaintiff (a).

(a) *vide Graham and Others v. Hope and Others*, post 154.

Thursday,
March 3d.
At Guildhall.

Commercial men may be called as witnesses to prove the meaning of any particular expression used in a letter on a commercial subject.

CHAURAND and Another v. ANGERSTEIN.

ASSUMPSIT on a policy of insurance on a ship from *St. Domingo* to *Nantz* in *France*, lost or not lost.

The policy was effected on the 4th of *January*, 1790, and at the same time a letter of the Plaintiffs' shewn to the underwriter, wherein it was said that the ship was to sail in the month of *October* preceding. On seeing this letter the policy was subscribed at a premium of £6 per cent. Previous to writing this letter the owners had received two letters from their captain, wherein he said he reckoned he should sail between the 5th and the 10th of *October*. He did sail on the 11th of that month.

On the part of the Defendants several merchants and commercial men were called, who said that the expression "in the month of *October*" was well understood amongst men used to commercial affairs to signify some time between the 25th of that month, and the 1st or 2d of the succeeding month; and they said that had it been conceived that the ship was to sail between the 5th and 10th of *October*, it would have made a difference of 15 per cent. in the premium, * and many underwriters would not have subscribed the policy on any terms. Mr. *Barnwell*, who was also examined as a witness, said, that he understood the expression to signify that the voyage was to commence on the 15th or 20th of *October*, and not before.

Lord

If it is said in a letter that a ship will sail from *St. Domingo* in the month of *October*, it is generally understood that she will not sail till the 25th of that month.

LORD KENYON. The party was in possession of these letters two months before the assurance was made. He might have sent copies of them without garbling any part of them, and then the underwriters might have judged for themselves. The evidence of underwriters is good evidence on this subject.* In questions on the arts and sciences the evidence of persons versed in those arts is daily admitted. Foreign laws are also matters of evidence, and yet all these are only the opinions of the witnesses (a). His Lordship therefore left it to the Jury to consider whether this was not such a material suppression of facts as avoided the policy.

The Jury found for the Defendant.

In the following term a rule to shew cause why a new trial should not be had, was obtained by the Plaintiff, but upon cause being shewn against that rule it was discharged, and the verdict established.

(a) *Vide Thornton v. The Royal Exchange Assurance Company, ante 25.*

* BELL v. DRUMMOND, Executor, &c.

[* 45]

THIS was an action of *assumpsit* for work and labour done and performed by the Plaintiff for Paterson the testator.

It appeared that the testator was clerk to the commissioners of the land-tax, and that the Plaintiff had done the business of his office at a salary of £100 a

E

year

If a clerk to the commissioners of the land-tax be appointed clerk to the commissioners for managing other taxes, his deputy who performed all the duties of his office is not therefore intitled to an increase of salary.

year. 'That afterwards, on new duties (such as the servants' tax, &c.) being imposed, the testator was appointed clerk to the commissioners of those duties, and the Plaintiff also transacted that business, but no agreement had been made as to any increase of salary, though the labour of the office was considerably increased.

A gentleman of the name of *Till* was called, who proved that the Plaintiff having demanded an additional stipend the testator had desired the witness (as a friend to both parties) to consider what ought to be allowed the Plaintiff. That accordingly the witness did proceed to make an estimate, but before he had finally made up his mind the testator died.

All money due on account of the settled salary of £100 had been paid; the only question therefore was whether the Defendant was entitled to any additional salary.

Lord KENYON said, that had the Plaintiff's case rested wholly on the fact of the new duty being imposed upon him, he should not think it such a case as would have entitled him to come into a court of justice for an additional stipend on a *quantum meruit*: if it was, every porter in a shop, or clerk in an office, * would upon an increase of his master's business be equally intitled to demand an increase of wages. But upon the evidence produced it appeared clearly that the testator himself thought that he ought to pay something, and the only matter in controversy between him and the Plaintiff was the *quantum* of the additional allowance.

The Plaintiff had a verdict.

LOWDEN v. GOODRICK.

TRESPASS and false imprisonment.

Justification, under the act of 29 Geo. 3. (a) as a superior officer, the Plaintiff having behaved mutiniously on board a *Guinea* ship.

Under the *alia enormia* in trespass, no can be given in evidence which might, consistent with decency, be stated in the declaration.

The Plaintiff proved that for thirteen weeks he was kept in irons on the coast of *Africa*, and during all that time was exposed to the burning sun and heavy showers of that country, and that the irons galled his wrists so much that they were in danger of mortification. Further his counsel offered to prove that he was stinted in his allowance of food, contending that this, though not laid in the declaration, might be given in evidence to prove the malice of the Defendant.

Lord KENYON. It has been many times determined that nothing can be given in evidence under the *alia enormia*, except acts which could not be put * on the record. It is no part of the declaration. In actions for criminal conversation and the like, things which could not with decency be put upon the record, may be proved under the *alia enormia*; but evidence like that now offered cannot be admitted under it (b).

The Defendant having called witnesses, and proved that the Plaintiff had not been wholly blameless, the Jury found a verdict for the Plaintiff £100 damages.

(a) 29 Geo. 3. c. 66. § 19.

(b) *Vide Pettit and Addington, post 62. Sippora v. Basset, 1 Sid. 225. acc.*

STUBBING v. HEINTZ.

If when a master give his servant money to buy meat for the use of the family, the servant, instead of paying ready money order the meat on credit and embezzle the money, the master is not liable.

ASSUMPSIT for goods sold and delivered.

At *Midsummer* 1784, the Defendant contracted with the Plaintiff to serve him with all kinds of meat at $5\frac{1}{2}d.$ per lb. for *ready money*. The cook maid was accustomed to order the meat, and when the bill amounted to a few shillings or a guinea, used to pay it; in general she paid once a week, on a *Monday* morning; and the Defendant always gave the servant money to pay the bills. This course of dealing continued for a long time, and several successive servants paid the money they received from the Defendant as above stated. At length the Defendant got another cook maid, and gave her money as usual, but she did not pay the bills as the others had done, but suffered them to be in arrear £33 3s. 3d. She then ran away from the Defendant's house, after which the Defendant was called upon, for the first time, to pay this sum of money, and on his refusal the Plaintiff brought * the present action. The Defendant also proved that when his family were absent from town in the summer, a servant, who was left to take care of the house, had meat for her own support from the Plaintiff, and paid him for the same, but he never demanded this sum of money from that servant, or mentioned to her that it was owing to him from the Defendant.

[* 48]

Lord KENYON said nothing could be clearer than that where a man gives his servant money to pay for commodities as he buys them, if the servant pockets that

that money, the master will not be liable to pay it over again. But if the master employs his servant to buy things on credit, he will be liable to whatever extent the servant shall pledge his credit. Here the contract between the parties was to deal for ready money: and the Plaintiff when he let the bill run on to such an amount as the sum now claimed, was giving credit to the servant, and not to the Defendant. The Defendant had not entered into any new contract, but still thought that he was dealing on the same terms as before.

Verdict for the Defendant (a).

(a) *Vide Gilbert's Law Ev.* 180. *Peake's Evid.* [234.] 250.

CASES IN K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER EASTER TERM,

31 GEORGE III. 1791.

Tuesday, June
7th.
At Westminster.

YOUL v. HARBOTTLE.

TROVER for goods.

If a carrier has goods to carry, and by mistake deliver them to a wrong person, this is such a tortious conversion as will support an action of *trover* at the suit of the right owner.

The Plaintiff had put the goods in question on board the Defendant's packet-boat, to be carried from *London to Gravesend*. Another person coming to the Defendant's house, and saying that these goods belonged to him, the Defendant *under a mistake* delivered them to him.

Mingay, for the Defendant, objected that upon this evidence the Plaintiff must be nonsuited. Here was no evidence of a conversion, and though the Defendant was liable to a special action on the case, yet *trover* could not be supported.

[* 50] * *Erskine* relied on the case of *Syeds* and Another v. *Hay (a)*, determined last Term, which, he said, shewed this act of the Defendant to be a conversion.

(a) 4 T. Rep. 260.

Lord

LORD KENYON. That case was determined on such peculiar circumstances, that it is hardly possible it should ever apply as an authority in a case not exactly parallel with it. I agree that when a carrier loses goods by accident (*b*), trover will not lie against him, but when he delivers them to a third person and is an actor, though under a mistake, this species of action may be maintained.

Verdict for Plaintiff.

(*b*) *Vide* 2 Salk. 655.

SMITH and Another v. PICKERING.

ASSUMPSIT by the indorsees of a bill of exchange against the acceptor. The bill was drawn by *Richardson and Hill* on the Defendant, and was payable to the order of the drawers. They delivered it to the Plaintiff for a valuable consideration, but forgot to indorse it. Afterwards they became bankrupts, and then *Richardson* made an indorsement on the bill.

If a trader deliver over a bill for a valuable consideration to another and forget to indorse it, he may indorse it after he has become a bankrupt.

LORD KENYON. I am clearly of opinion, that this is a good indorsement by the bankrupts. The Plaintiffs had the equitable claim, and it is clear that nothing passes to the assignees of a bankrupt, but property that really and beneficially belongs to the bankrupt. *Though the bankrupts had the legal estate in this bill, yet it was unattended by any interest, and they were bound to indorse it.

[* 51]

Verdict for Plaintiff.

And in such case the evidence of one partner that his partner had told him at the time he had paid it away is admissible.

Note. The bankrupt *Richardson* was permitted to give this evidence, though *Hill* had delivered the bill to the Plaintiff. Lord *Kenyon* holding that what *Hill* had told *Richardson*, at the time, might be given in evidence by him, the act of one partner being the act of the other; and the acknowledgment made by *Hill* to *Richardson* being against his own interest. *Hill* had absconded. In the next term *Mingay* moved for a new trial, on the ground that *Richardson*'s evidence was not admissible, but the Court discharged the rule.

Wednesday,
June 8th.
At Guildhall.

WILLIAMS qui tam v. PULLEY.

In an action for insuring tickets in the *Irish* lottery, the act of parliament establishing such lottery must be proved.

DEBT for several penalties for insuring tickets in the *Irish* lottery.

The first count of the declaration stated that the Defendant received a sum of 9*d.* to repay £1 1*s.* in case a certain ticket therein mentioned "in a certain *Irish* Lottery, authorized and established by a certain *Irish* act of parliament, made and passed in the 29th year of the reign of his present Majesty, should be drawn &c."

Erskine, for the Defendant, objected that the act of parliament should be proved before any evidence was admitted of the insurance.

Bearcroft, for the Plaintiff, contended that the Defendant having admitted, by the insurance, that
such

such an act of parliament did exist, should not be permitted now to dispute it.

LORD KENYON. I agree that in many cases a man may be estopped by his own acts from contesting his situation, even in a penal action: thus if a man, *acting* as a commissioner of excise, solicit votes at an election, I would not oblige the Plaintiff to prove that he was in fact appointed to that office (*a*). Had this declaration merely stated that he had insured a ticket in a certain *Irish* lottery, it perhaps would not have been necessary for the Plaintiff to prove the act of parliament or lottery; but as a particular act of parliament is here stated, it is incumbent on him to prove that such an act of parliament did exist.

The Plaintiff was nonsuited.

(*a*) See these cases collected *Peake's Evid.* 20.

HUMPHREY v. MOXON.

ASSUMPSIT on a bill of exchange, indorsee against acceptor.

The drawer of a bill of exchange may be a witness for the acceptor to prove it paid.

The Defendant's counsel offered to call the drawer to prove that the bill was paid by him, and relied on the case of *Gardner and Carter*, determined some time since.

Erskine objected to this witness. This case differs from that of *Gardner and Carter*, there the payee was the Plaintiff; this action is brought by the indorsee.

LORD KENYON. It makes no difference. The Courts have

[* 53] have laid down a rule that a man shall not destroy his own security. This man does not come to destroy his security, but to shew that it has been satisfied.

He was therefore received, but it appearing that notice had been given to him, the day after the bill became due, of its having been dishonoured by the acceptor, he was again objected to on account of interest.

Quere. Whether the drawer can be a witness if he has had regular notice of the bill having been dishonoured.

Lord KENYON inclined to think this last objection a good one, because being liable to pay the bill himself on account of due notice having been given, by proving it paid now he destroyed the bill, and would eventually discharge himself. His Lordship however doubting whether the notice was given early enough, did not reject, but admitted his testimony, subject to the opinion of the Court if the Plaintiff chose to move for a new trial.

The bill was for £73, and the witness proving payment of £30 only, the Plaintiff had a verdict for the balance (a).

(a) *Vide* *Charington v. Milner*, ante 6. *Phetheon v. Whitmore*, ante 40. *Adams v. Lingard & al'* post 147, and cases there cited, and *Rich v. Topping*, post 224. and the note thereon.

SPITTY v. BOWENS.

Haverley,
June 2th.
At Westminster.

In an action for sinking a barge, on board of which the Plaintiff had a cargo of corn, the master may be a witness for him upon being released.

THIS was an action on the case for not putting a buoy over a barge of the Defendant's which had sunk in the *Thames*; by reason whereof a barge laden with corn belonging to the Plaintiff was sunk, and the corn much injured.

To

To prove the accident the Plaintiff released the master of the barge, on board of which his corn was, and called him as a witness.

* *Bearcroft* objected to him. If the Defendant is [* 54] liable to make amends to the Plaintiff, he is liable also to make amends to the witness for the damage done his barge; and the record of the recovery in this action would be evidence against the Defendant in an action at the suit of the witness.

Lord KENYON thought that the record in this cause would not be evidence in that, and therefore that he was a competent witness, but offered to save the point if the Defendant's counsel desired it.

The weight of evidence being in favour of the Defendant, he obtained a verdict (a).

(a) *Vide Rotheroe v. Elton*, post 84.



HENBEST and OTHERS, Assignees, &c.
v. BROWN.

THE petitioning creditor's debt in this case was for goods sold and delivered; and the Defendant endeavoured to prove that credit was to have been given for them, and that the commission was taken out before the day of payment arrived.

Lord KENYON said, the inclination of his mind was, that all debts whatever, though not due, were sufficient, under the statute 5 Geo. 2. c. 30. to support a commission

If a trader buy goods on credit and commit an act of bankruptcy, the creditor may take out a commission before the day of payment under the 5 Geo. 2. although no written security is given for the debt. *Comme semble.*

commission, and that the act was not confined merely to bond debts, notes, and bills.

But it not being proved that any credit was to have been given, this point was no further discussed (a).

(a) *Vide Cockran v. Love*, 1 Co. upon an agreement to be paid for
Bank. L. 23. accord. but in *Hos-* by a present bill, payable at a
kins v. Duperoy, 9 East. 498. the future day, but which was not ac-
Court of King's Bench decided tually given did not create a pre-
that the stat. 7 Geo. 1. c. 31. s. 1. sent debt, sufficient to support a
and 5 Geo. 2. c. 30. s. 22. were commission. By stat. 49. Geo. 3.
confined to debts due on bills, c. 71. s. 9. such debts are made
bonds, promissory notes, or other *provable* under the commission, on
written securities of the like sort, making a rebate of interest.
and that goods sold or delivered,

[* 55]

Friday,
June 10th.
At Westminster.

* FORES v. WILSON.

A master may maintain an action for debauching his servant, though he is no ways related to her in blood.

THIS was an action for assaulting the maid servant of the Plaintiff, and debauching her *per quod servitium amisit*.

The servant was no relation to the Plaintiff, but merely a servant. The Plaintiff proved by his first witness that the Defendant enticed the girl to leave the Plaintiff's service, and kept her to live with him for some time; he then called a witness to prove that he had debauched her.

Erskine, for the Defendant, objected to this evidence, contending, that this action being brought by a person who was no relation to the person seduced, the Jury could not take the injury which she had sustained into their consideration.

Lord

Lord KENYON. This is an action in which damages may be given to recompence the servant for the injury she has received. Undoubtedly there must subsist some relation of master and servant, but this action materially differs from the common action for seducing a hired servant to leave her master's service. In that kind of action the Plaintiff must prove that the Defendant knew the servant was in his service, but no such knowledge is necessary to support this action. And though a degree of the relation of master and servant must subsist, yet a very slight relation is sufficient; as it has been determined, that when daughters of the highest and most opulent families have been seduced, the parent may maintain an action, on the *supposed* relation of master and servant, * though every one must know that such a child cannot be treated as a menial servant (*a*).

In an action for debauching a servant *per quod &c.* it is not necessary to prove that she was employed as a menial servant.

[* 56]

Verdict for the Plaintiff (*b*.)

(*a*) *Vide Jones v. Brown and Dearman*, 11 East. 24. in which Another, *post* 233. the Court held that a person who

(*b*) *Vide Edmondson v. Machel*, 2 T. Rep. 4. where it was holden the aunt might maintain the action 3 Burr. 1878, and *Irvin v.* had adopted the daughter of his deceased friend might recover damages *ultra* the mere loss of service.

BAILEY v. GOULDSMITH.

Saturday,
June 15th.
At Westminster.

If goods are delivered on the terms of sale or return, and the person receiving them does not return them in a reasonable time, the value of them may be recovered in an action for goods sold and delivered. (a)

ASSUMPSIT for goods sold and delivered. The goods were delivered on the terms of sale or return, so long since as the beginning of the year 1789, and consisted of waistcoats made in *England*, exported to *France*, there embroidered and imported again into *England*.

Two questions were made, first on the sale and return, the Defendant contending that he was not obliged to keep these goods. 2dly. Whether the goods were contraband or not.

Lord KENYON, as to the first point, said that no certain time being mentioned for the return of the

(a) *Vide Bromley v. Corwell*, 2 Bos. & Pul. 438, where the Plaintiff being a printseller, and the Defendant a mate of an Indiaman, the latter was intrusted by the former with some prints to dispose of in India, and a written agreement was entered into, by which it was stated, "That the Plaintiff agreed to send out by the Defendant certain prints, and provided that if the Defendant could dispose of any one, or all of them at above one guinea each, he was to be accountable to Plaintiff on his return to England, for as many as he might dispose of at one guinea each; who agreed to take all, or as many as might be returned, provided he could not sell them in India, or at any other port he might touch at, without expecting any sum from the Defendant, or making any charge; and Plaintiff further agreed and authorized Defendant to sell them for whatever they might fetch, if not more than one guinea might be offered for them separately." The Defendant not being able to sell any of them in India, left the prints with an agent in India, with directions to remit the money to him in England. Held he was not answerable for the value in trover. Qu. if any action would lie in this case?

goods

goods, the Jury should consider whether a reasonable time had elapsed for the return according to the usual course of dealing in that trade. His Lordship was inclined to think there had, and if the Jury should be of that opinion he should consider them as goods *sold and delivered*. As to the second point, his Lordship said he would not determine it at *Nisi Prius*, but wished the Jury to leave that for the opinion of the Court, if they should find for the Plaintiff on the first point.

* The Jury were about finding for the Defendant, [* 57] as to all the money claimed except £1 5s. (the value of one of the waistcoats) upon which the Plaintiff's counsel consented to a nonsuit, to avoid the consequences of the Court of Conscience act.

POWELL qui tam v. FARMER.

DEFT on the statute of the 5th of *Eliz.* for using the trade of a Baker, not having served an apprenticeship thereto.

In a penal action for exercising a trade not having served an apprenticeship the Plaintiff is not obliged to prove that Defendant used the trade all the time laid in the declaration, it is said that he forfeited 40s. for each month.

The first count stated, that the Defendant did *set up*, use and exercise the mystery, &c. of a Baker for a long time; to wit, from &c. to &c. being eleven months without, &c. whereby he forfeited the sum of 22l. to wit, 40s. *for each and every month* during which, &c.

The second count stated that he did *use*, &c.

The

The Plaintiff did not prove that the Defendant used the trade for all the time laid in the declaration, but only a part of it.

Lord KENYON. It being laid that the Defendant forfeited 40*s.* for *every* month during which he exercised the trade, the Plaintiff is entitled to recover as many penalties of 40*s.* as he can prove months in which the Defendant used the trade. He is not obliged to prove that the Defendant exercised the trade during all the time laid in the declaration.

Verdict for the Plaintiff for one penalty of 40*s.*

[* 53]

Wednesday,
June 15th,
At Westminster.

* HOLLAND *qui tam* v. DUFFIN.

An illegal policy of insurance on lottery tickets may be read in evidence without being stamped.

THIS was an action to recover several sums of money forfeited for insuring tickets in the lottery, contrary to the statute 22 *Geo.* 3. *c.* 47.

The Plaintiff gave in evidence a paper, purporting to be a policy of insurance.

Mingay objected that this paper could not be read in evidence, unless it was stamped with a 6*s.* agreement stamp.

Garroze answered, that it was an illegal contract, and therefore could never be intended by the Legislature to be the object of taxation and revenue.

Lord KENYON thought it was good evidence without any stamp, but said he would save the point if the Defendant desired it.

Ten

If several tickets are insured at the same time it makes but one offence.

Verdict for the Plaintiff for one penalty of £50

* KANNEN, W. M. MULLEN.

[* 59]

Thursday,
June 16th.
At Westminster.

It is a good defense in an action by an Apothecary that he treated the patient ignorantly or improperly.

After if the medicines were administered under the direction of a physician.

F

Erskine

Erskine in his reply to the Jury, contended that in this action a very different question was to be tried, than in an action by the patient against the Surgeon, for improper treatment. Lord *Mansfield*, he said, had held that in no case could the Defendant make improper treatment a ground of defence, because the Plaintiff could not have proper notice of that defence, and be prepared to answer it, as in an action against him; but Lord *Kenyon* had laid down a rule that where plain misconduct appeared, the Plaintiff should not be permitted to recover any damages; but this must be a plain and certain misconduct, not one on which the minds of the Jury could by possibility doubt.

LORD KENYON. In a case where the demand is compounded of skill and things administered, if the skill, which is a principal part, is wanting, the action fails, because the Defendant has received no benefit.

[* 60] * Many cases may be imagined where great mischief would happen were the law otherwise. If a man is sent for to extract a thorn which might be pulled out with a pair of nippers, and through his misconduct it becomes necessary to amputate the limb; shall it be said, that he may come into a court of justice to recover fees for the cure of that wound which he himself has caused? I do not say that this case amounts to that put, but where shall the line be drawn? If the medicines applied, had been given under the direction of a Physician, however improper they might be, the action should be supported, because the skill would not in that case be the ground of the action. His Lordship, after commenting upon the evidence, left it to the Jury to consider whether or not the

the Plaintiff had misconducted himself, for upon that must their verdict depend.

The Jury found for the Plaintiff for the money charged for medicines.

(p) See *Basten v. Butler*, 7 East. 479. and *Peake's Law Ev.* 3d ed. 266. note (p) where the cases on this subject are collected.

BLAND v. SWAFFORD.

THIS was an action against the Defendant for not appearing as a witness on the trial of an ejectment, wherein *Bland* was lessor of the Plaintiff, agreeable to a *subpoena* with which the Defendant had been served; by reason whereof the Plaintiff was obliged to withdraw his record.

No action lies against a witness for non attendance, unless the cause has been called on and the Jury sworn.

LORD KENYON declared himself of opinion that the action would not lie against a witness merely on the record being withdrawn, nor in any case unless the cause had been called on and the Jury sworn. The *Court had no jurisdiction till such time as the Jury was sworn, and if the Plaintiff meant to bring an action against the witness for not attending, he should have suffered the cause to be called on and have been nonsuited, after which he might have maintained the present action. His Lordship was proceeding to order the Plaintiff to be called; when *Mingay*, the Plaintiff's counsel, desired that the point might be saved, which was consented to.

[* 61]

The merits being against the Plaintiff, he was nonsuited.

* BARBER v. BACKHOUSE and Others.

If there is no consideration for part of the sum contained in a bill of exchange, the Jury may apportion the damages and need not find to the whole amount.

ASSUMPSIT on a bill of exchange. *Brown* one of the Defendants had suffered judgment by default, the other Defendants had paid £5 9s. into Court.

As to the remainder of the money contained in the bill, they contended they were not liable. The case was as follows; the £5 9s. paid into Court was the amount of the Plaintiff's bill for business done as an Attorney for all the Defendants; the remainder of the money was for business done for *Brown* only. The bill was drawn by *Brown* on the partnership, and accepted by him unknown to the other Defendants.

Law for the plaintiff contended, that the £5 9s. paid into Court, could not be applied to any other count but that on the bill of exchange, for there was no count on an Attorney's bill; and if the bill was good for part it was good for the whole.

[* 62] * Lord KILLYON declared himself to be clearly of a contrary opinion, and on this opinion a verdict was given for the Defendant.

Law said he would look into the cases, and take the opinion of the Court upon the case, if he found them favourable to him. He never moved the Court for a new trial; but upon Lord *Kenyon* in the next term mentioning this case in the course of argument, Mr. *Law* said he was perfectly satisfied with the decision (a).

(a) *Vide Ledger v. Ewer*, post 261 accord*. See *vide 2 Burr.* 1802 where Mr. *J. Denison* is reported to have said, "there is a distinction between the contract and the security. If part of the contract arises on a good consideration, and part on a bad one, it is divisible. But it is otherwise as to the security. That being entire, is bad for the whole."

PETTIT v. ADDINGTON, Esq.

Friday, June 17.
At Westminster.

ASSAULT and false imprisonment

The Plaintiff had obtained a warrant from Mr. *Walker* a magistrate, to apprehend a man for an assault; and it not having been executed, she, on the 23^d of August 1790, applied to the Defendant, who was also a magistrate. He being at that time engaged in other business, the Plaintiff forced herself into his room, and behaved there with great indecency, making a noise and insisting on her business being attended to. The Defendant desired her to be quiet, and threatened to commit her unless she altered her conduct. She still persisted, and he committed * her to *Tothul Fields Bridewell*, where she remained until the 23^d of October following.

In trespass, and false imprisonment, the Plaintiff cannot give evidence of his health being injured, unless laid under a *per quod*, the common conclusion that he became and was sick, weak, &c. is not sufficient. 2 Whether a Justice of Peace has a right to commit it for a contempt when not sitting in court?

[* 63]

Whilst she was in prison she (as well alledged by her counsel) caught the gaol fever, and communicated it to her husband, in consequence of which he died.

The Declaration stated, that the Defendant assaulted, &c. and imprisoned the Plaintiff, and kept and detained, &c. from, &c. to, &c. *during all which time* she laboured under great pain of body and anxiety of mind, and *became and was sick, weak and dis-tempered.*

Lord KENYON said, that as this was not laid with a *per quod* the jury could not take into their consideration, nor could he receive evidence of the fact of her getting the gaol fever; for it did not appear to be in consequence of the imprisonment. As to

the great question whether a magistrate, not sitting as chairman of a court, but at his private office, could commit for a contempt, he must own he had a leaning on his mind, but still he would not deliver or intimate any opinion, as he wished it to be seriously considered and determined in Court. His Lordship therefore directed the Jury to find a verdict for the Plaintiff, subject to the opinion of the Court on that point (a).

In the following term this cause was argued by *Erskine* for the Plaintiff; but the Court did not then give judgment, and I believe the case has not since been before the Court.

(a) *Vide Lowden v. Goodrick, ante 46.*

[* 64]

* *DAWE and Others v. HOLDSWORTH and Others.*

To support a commission of bankrupt it is necessary that the petitioning creditor's debt should be contracted before the bankrupt ceases to be a trader. But if the debt be contracted whilst he is in trade, and a bond given for it afterwards, it is sufficient.

TROVER for horses, &c. which had been assigned by one *Pittard* to the Plaintiffs, under a bill of sale.

The defence set up was, that *Pittard* had become a bankrupt, and that the Defendants were his assignees. That after this bill of sale he continued in possession of the waggons and horses, selling some and buying others in their room, and exercising every act of ownership over them; wherefore, as against the Defendants, this bill of sale was fraudulent and void.

To

To establish the bankruptcy, the Defendants proved that *Pittard* was a trader, and continued so till the year 1785; when he became indebted to one creditor in £200; upon whose petition a commission of bankrupt issued against him. The debt was contracted for goods sold, but a bond was afterwards given.

Bearcroft for the Plaintiff objected, that they could not give other evidence of the debt, than by proving the bond.

Lord KENYON. Though the bond would be a bar to an action on the simple contract, yet it does not preclude the Defendants in this case from proving the consideration. If it were so, a man becoming indebted whilst a trader, and giving a bond for the debt after he had left off business, could not be made a bankrupt on it. But I hold the contrary to be clearly the law, for the question to be considered is, whether the debt was contracted during the time he was a trader (a).

* The Plaintiff, on the cross examination of the Defendant's witness, proved that there were other dealings between the bankrupt and the petitioning creditor after 1785, when the bankrupt ceased to be a trader, and that though at the time the commission was taken out, there was a considerable larger balance than £200 due to the petitioning creditor, yet that more than £200 had been paid on account between the year 1785 and that time.

[• 65]

Lord KENYON. As no particular directions were given about the application of the money paid on account, I must place it to pay off the old debt first, if

(a) *Vide Ambrose v. Clendon*, 12 Str. 1042, and Cas. temp. Hardw. 267. accord.

so it appears that no part of the debt contracted during the time *Rittand* was a trader, was due when the commission issued, and consequently it is unsupported (a).

The Jury therefore found a verdict for the Plaintiff.

(a) *Vide Co. Bank Law*, 22, &c. any specific appropriation of it, *Meggott Assignee, &c. v. Miller & al.* 1 *Ld. Raym.* 286, acc. and as it would go in discharge of the *Hammersley v. Knowllys*, 2 *Esp. Cas.* 66. where Lord Kenyon held, then existing debt; and that the banker could not hold the maker of the note responsible for more than the balance remaining due at the time of such payment, though he afterwards trusted his debtor with a further sum of money, that the note of A. being deposited by B. at his bankers as a security for money, the bankers knowing it was an accommodation note; and B. afterwards paying money to his bankers without

KEMPLAND v. MACAULEY and Another.

Evidence that the original defendant acknowledged the debt is admissible in an action against the sheriff, for a false return.
4 Term Rep.
456. S. C.

THIS was an action against the sheriff of *Middlesex*, for a false return of a *fiery facias*.

The sheriffs were nominal Defendants only, the real Defendant was another creditor who had also sued out a *fiery facias* against the goods of the debtor; but which execution was not delivered to the sheriff till after that at the suit of the Plaintiff had been delivered. The Defendants levied the goods on the other writ in preference to the Plaintiff's, contending that his writ was fraudulently sued out to cover the goods. * Of course the real existence of the Plaintiff's debt came in question.

Amongst

Amongst other evidence the Plaintiff called a witness to prove that the Defendant in the former cause (who was the son of the Plaintiff) had acknowledged to him that he owed the debt.

Erskine for the Defendant, objected that though this was good evidence against the original Defendant, yet it was not so in this action, for the defence was that this admission was fraudulent, and made for the purpose of protecting the goods against fair creditors. If this was to be allowed, two persons who meant to defraud a third, would always have it in their power to do so.

Lord KENYON thought this good evidence in this cause. It is the daily practice in actions brought by assignees of a bankrupt, to prove declarations of the bankrupt before he became so: but at the same time his Lordship said he would take a note of the objection.

The Defendant then produced a letter from the Plaintiff's attorney to the sheriff's officer, wherein he directed him not to levy under the writ till a future day; before which day arrived, the other creditor's writ had come to the office, and the sheriff levied thereon.

If a fi. fa be delivered to the sheriff, and he is directed not to levy thereon till a future day, and in the mean time another writ is delivered, he is to levy on the second writ as if no other had been delivered to him.

Lord KENYON was of opinion, that though in general the sheriff must first levy on the writ which he first receives, yet if the Plaintiff in that writ directs it not to be executed before a distant day, and in the mean time another execution comes, the sheriff is not to keep the first writ hanging over the heads of other creditors, but is to levy under the last execution as if no other had ever been delivered to him.

On his Lordship declaring his opinion, the Plaintiff's counsel consented to a nonsuit (a).

(a) *Vide Smallcomb v. Buckingham*, Salt, 326. 1 Lord Raym. 251
Bradley v. Windham, 1 Will. 44. accord.

Saturday,
 June 18th.
 At Westminster.

PHILPOT v. HOLMES

Where the Plaintiff is in the actual occupation of the close, the Defendant cannot, in an action of trespass, give evidence of property in a stranger under the general issue (a).

TRESPASS for breaking and entering close, &c.
 Plea general issue.

The Plaintiff proved that he was in the actual possession of the close in question, and that the Defendant committed the trespass complained of. In answer to this the Defendant offered to prove that a part of this close was the property of other persons, and that the Defendant by their orders entered that part.

LORD KENYON. Where the land is not in the actual possession of any person, as commons and the like, the Defendant may prove the legal possession to be in a third person, on the general issue, but as in this case the plaintiff was in the actual occupation, though he had no legal right whatever, the Defendant cannot defend himself on these pleadings.

Verdict for the Plaintiff.

(a) *Vide Dodd against Kyffin*, 7 T. Rep. 354. and *Argent v. Durant*, 8 T. Rep. 403. contra.

WARWICKE v. NOAKES!

Tuesday, June 21,
At Guildhall.

ASSUMPSIT for goods sold and delivered, and money had and received.

If a debtor is directed by his creditor to remit money by the post and it is lost, the creditor must bear the loss.

[* 68]

*The Plaintiff was a hop merchant, and the Defendant his customer, living at *Sherborne* in *Dorsetshire*. The Plaintiff sold him hops, and also sold hops to several persons in that neighbourhood; and requested the Defendant (as his friend) to receive the money due to him from his other customers, and remit him by the post a bill for those sums, and also the money due to him from the Defendant himself. 'A bill was accordingly' remitted, but the letter got into bad hands, and the bill was received by some third person at the banker's on whom it was drawn.

Lord KENYON. Had no directions been given about the mode of remittance, still this being done, in the usual way of transacting business of this nature, I should have held the Defendant clearly discharged from the money he had received as agent. It was so determined in the Court of Chancery forty years since: and as the Plaintiff in this case directed the Defendant to remit the whole money in this way, it was remitted at the peril of the Plaintiff.

The Plaintiff was nonsuited.

WILLIAMS v. DYDE and Others.

Where a bankrupt promises to pay a debt due before his bankruptcy, the Plaintiff may declare generally on the original consideration.

TO this action of *assumpsit* for goods sold and delivered, the Defendants pleaded their discharge under a commission of bankruptcy.

The Plaintiff's counsel stated, that the Defendants had promised to pay the debt, after they were discharged by their certificate.

[• 69]

* *Erskine* for the Defendants, objected that this promise could not be given in evidence under the count for goods sold and delivered. To avail himself of this promise, the Plaintiff should have declared specially, that the Defendants being indebted, and having been discharged under the commission, promised to pay the debt from which they had been so discharged.

Lord KEYTON. I think this declaration is sufficient, as it stands. In cases where the statute of limitations has been pleaded, the replication that he did promise within six years has always been held sufficient, for the new promise revives the old debt.

Verdict for the Plaintiff, (a),

(a) *Russell v Hardman*, K B. Loughborough C. J. in *Besford v. Mich. Term 33 Geo 3* accord *Saunders*, 2 H. Blac. 116. In Where the bankrupt promises to pay when he is able, the Plaintiff must prove his ability. So held by *Barley v. Dillon*, 2 Burr. 736. the bankrupt being held to bail on such a promise the Court discharged him on a common appearance. *Gould and Heath*, Justices, contrary to the opinion of Lord

VRAY Assignee, &c. v. BARWIS.

Wednesday,
June 22.

THIS was an action for money had and received. The Plaintiff and the Defendant were joint assignees under a commission of bankrupt; but the Defendant having received money due to the bankrupt's estate for which he had not accounted, the creditors presented a petition to the Lord Chancellor for his removal, who, upon hearing of that petition, made an order to remove him, and that the Plaintiff, the other assignee, "might proceed as he should be advised," but no specific directions were given for the bringing this action.

If an action brought under the direction of the Court of Chancery is defeated by a formal objection, that court will make the person taking such objection pay all costs. Whether the assignee of a bankrupt can maintain an action for money had and received against his co-assignee who has been removed (a).

* *Beacroft* for the Defendant, was proceeding to make a formal objection to the action, but he was stopped by Lord *Kenyon*, who said it would be prejudicial rather than advantageous to the Defendant to nonsuit the Plaintiff in this action; for that it was a constant rule in the Court of Chancery, to make the Defendant pay all costs when he defeated an action brought under the direction of that Court, by a formal objection; and though this action was not specifically directed by the Court, still the consequence would be the same to the Defendant

[* 70]

Verdict for the Plaintiff.

See *Smith and Others v. Jamieson and Another*, post 212.

CASES IN K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER TRINITY TERM,

31 GEORGE III. 1791.

1791.

Friday, July 15.
At Guildhall.

LONGCHAMPS dem. EVITTS v. FAWCETT.

In an ejectment between two persons, (both claiming under a demise from the same person) the landlord, who has become a bankrupt, may be a witness to prove that the premises in dispute were not included in the first lease.

THE lessor of the Plaintiff claimed the premises in question under a lease from one *Andrews*, who had since become a bankrupt. The Defendant also claimed a lease from *Andrews*; but the lease granted to him was of a date subsequent to that under which the lessor of the Plaintiff claimed.

There being an ambiguity in the words of the first deed, the Defendant called *Andrews* as a witness, to prove that the premises in dispute were not included in the premises demised by that deed (a).

On an objection being made to his competency, Lord *Kenyon* said, that as he had parted with the reversion, by the assignment under the commission, he

(a) In the case of *Doe demd Freeland* against *Burt*, 1 T. Rep. 701. the Court held that the lessor was not estopped by his deed from going into evidence to shew the extent of the premises demised.

was an admissible witness; but that he should have thought him incompetent, had he still been intitled to the reversion.

He was accordingly (after releasing his allowance and surplus) permitted to give evidence; and on his evidence the Defendant obtained a verdict (b).

(b) *Vide Bell v. Harwood*, 3 Term Rep. 308. where the lesser was admitted as a witness.

HARRIS v. WATSON.

IN this case the declaration stated, that the Plaintiff being a seaman on board the ship *Alexander*, of which the Defendant was master and commander, and which was bound on a voyage to *Lisbon*: whilst the ship was on her voyage, the Defendant, in consideration that the plaintiff would perform some extra work, in navigating the ship, promised to pay him five guineas over and above his common wages. There were other counts for work and labour, &c.

No action will lie at the suit of a sailor on a promise of the captain to pay him extra wages in consideration of his doing more than the ordinary share of duty in navigating the ship.

The Plaintiff proved that the ship being in danger, the Defendant, to induce the seamen to exert themselves, made the promise stated in the first count.

Lord KENYON. If this action was to be supported, it would materially affect the navigation of this kingdom. It has been long since determined, that when the freight is lost, the wages are also lost (a). This

(a) *Herman v. Barden & al*, 3 Bar. 1844. *Abernethy v. Landale*, Dong. 520.

[* 73]

rule was founded on a principle of policy, for if sailors were in all events to have their wages, and in times of danger intitled to insist on an extra charge on such a promise * as this, they would in many cases suffer a ship to sink, unless the captain would pay any extravagant demand they might think proper to make.

The plaintiff was nonsuited.

Tuesday,
19th July,
At Westminster.

FARISH v. WILSON.

No action at law
lies for a legacy.

ASSUMPSIT for money had and received.

It was brought to recover a sum of £250 Bank-stock, being a legacy left to the Plaintiff's wife. The Defendant was the agent of the Plaintiff, and had, as stated by the Plaintiff, received the money.

LORD KENYON. Had this action been against the trustee or executor, I am clearly of opinion it could not be maintained. It is true there was one case, where it was said (*a*), that an action would lie for a legacy, but the very Judges who determined that case had *more than a doubt* upon their minds afterwards. And it is highly convenient and beneficial that Courts of Equity should have the sole jurisdiction in these cases. Those courts make provision for children, infants, married women, &c. according to the situation of the parties and circumstances of the

(*a*) *Vide 2 Sid. 21. 85. Keb. 116.*

case; whereas a court of law can only proceed according to the strict rules of law, without at all consulting the convenience of the parties. This is not the present case, I only took this opportunity of delivering my opinion, lest it should be thought that I was of opinion that in any case an action at law would lie for a legacy.

*The Plaintiff not proving the case stated was nonsuited (a). [* 74] .

(a) *Vide Atkins & Hill, Comp. ler v. Butler, 2 Lev. 21. & Ewer 284. Hawkes & Sanders, ibid. v. Jones, Salk. 415. and in a late 1789. Rose & Wife v. Bowler, 1 case where a leasehold estate had been bequeathed, and the executor had assented to the bequest, the devisee was permitted to recover the possession by ejectment, Doe son v. Shirman, 1 Sid. 45. Sir T. Raym. 23. S. C. But it has been determined that a legacy payable out of land, may be recovered by action against the heir. Vide But-*

WORRAL v. HAND Administratrix.

ASSUMPSIT for goods sold and delivered, &c.

Money received by an executrix for the good-will of a public house is assets in her hands.

Pleas *non assumpsit, plene administravit*, and bonds outstanding.

The Plaintiff proved that the intestate was a publican, and that for some time after his death the Defendant lived in the house, and afterwards sold the good-will of the trade for a sum of money.

On an objection by the Defendant's counsel, that this money was not assets in the hands of the Defendant.

LORD KENYON said, it was assets in her hands; though she was tenant at will after the death of the intestate. In the Court of Chancery, his Lordship said, it was the daily practice to consider all beneficial interests, such as renewable leases and the like, as assets, and to charge the representative with the money arising from them, and this was analogous to those cases.

The Defendant proving her plea of *plene administravit*, the Plaintiff took a verdict on the general issue, and the other issues were found for the Defendant.

[*75]

Thursday,
July 21st.
At Westminster.

*The KING *v.* PEARCE.

To prove the Defendant author of a libel, evidence of other libels written by the same person and concerning the same subject may be received.

THIS was an information against the Defendant for a libel on the Duke of *Arhol*, on his petitioning parliament respecting the *Isle of Man*.

To prove the Defendant the editor of the paper and author of the libel, *Luxford* the printer was called. He swore that he received the manuscript of the libel from the Defendant, and returned it to him (a). To corroborate the testimony of this witness, the prosecutor offered to give in evidence several paragraphs (written by the Defendant concerning the prosecutor and the *Isle of Man*) which were not stated in the information.

On an objection to this evidence,

LORD KENYON said, that though these were several and distinct offences, yet they might be received as

(a) Notice had been given to the Defendant to produce it.

evidence

evidence to corroborate the testimony of *Luxford*, and shew the Defendant to be the author of the present libel.

The witness then produced his copy of the paper which he had filed, but which was not stamped, and swore that the public newspaper called *The Morning Herald* (of which that was a copy) was published to the world in the ordinary way.

A copy of a new-paper may be read in evidence, though not stamped according to act of parliament.

Two objections were made to this evidence: *First*, that the copy produced was not stamped: *Secondly*, that a paper which had been actually published to the world should be produced.

To prove the publication of a newspaper it is not necessary to produce a copy which has been actually published.

* Lord KENYON. This is not like the case of deeds and agreements, where the acts of parliament expressly declare that no such instruments shall be read in evidence until stamped. Though the publisher of a paper would be liable to a penalty, for not getting the paper stamped before publication, yet it may be given in evidence. The publication of the paper is sufficiently proved by the evidence of the witness, who says that it was published in the usual way.

[* 76]

On the further examination of *Luxford*, it appeared that he had not delivered the original manuscript to the Defendant himself, but that he had delivered it to his own servant, who proved that he had delivered it to the servant of the Defendant.

Proof of delivery of a paper to the servant of the Defendant is not of itself sufficient to enable the prosecutor to give parol evidence of it.

Lord KENYON said this was not sufficient evidence to enable the prosecutor to give parol evidence of the existence of the paper; there was therefore no ground for considering the Defendant as the *author* of the libel. The only remaining question was whether he was proved to be the editor of the paper or not.

The Jury found the Defendant guilty.

Tuesday,
July 26th.
At Guildhall.

VALENTINE v. VAUGHAN.

A schoolmaster buying books and shoes, and selling them at an advanced price to his scholars, is not a trader within the bankrupt laws.

TRESPASS for taking goods.

Justification as messenger under a commission of bankrupt.

[* 77] The only question in the cause was, whether the Plaintiff was a trader within the bankrupt laws. He was a schoolmaster, and *as such* had bought school-books to the amount of £30 or 40 annually, which he retailed to his scholars at an advanced price. He also bought shoes, and supplied his scholars with them at a profit.

Lord KENYON was clearly of opinion that this was no trading within the bankrupt laws: wherefore the Plaintiff had a verdict.

Wednesday,
July 27th.
At Guildhall.

DU BARRÉ v. LIVETTE

An interpreter who is present at conversations between a foreigner and his attorney is bound to the same secrecy as the attorney himself, and ought not to divulge the facts confided to him after the cause for the purpose of which the confidence was placed, is at an end.

THIS was an action of trover for jewels &c. which had been stolen from the Plaintiff's house in France.

The Defendant was one of the robbers, and had been indicted at the *Old Bailey* for the theft, but it appearing that the robbery was committed in a foreign country, he was acquitted.

Previous to the trial at the *Old Bailey* he had several conversations with his attorney (*Crossley*) but the Defendant

Defendant being a *Frenchman*, and *Crossley* not understanding that language, it was found necessary to have an interpreter, which office was performed by a man of the name of *Rimond*.

Rimond was now called as a witness, to prove that the Defendant at those meetings admitted that he had stolen the diamonds &c. and had no property in them. Immediately the witness discovered the wickedness of the transaction, he abandoned the Defendant.

* The Defendant's counsel objected to *Rimond* being permitted to give this evidence, contending that this was a confidence which ought not to be broken. [• 78]

Garrow, for the Plaintiff, argued that this evidence ought to be admitted. No confidence was reposed in *Rimond*, he was merely the organ which conveyed the sentiments of the Defendant to his attorney, and those of the attorney to the Defendant. When he had done this, his duty was over, and he had no further concern with the Defendant. A case much stronger than this, he said, had been lately determined by Mr. Justice *Büller* on the Northern circuit. That was a case in which the life of the prisoner was at stake. The name of it was *The King v. Sparkes*. There the prisoner being a papist had made a confession before a protestant clergyman, of the crime for which he was indicted, and that confession was permitted to be given in evidence on the trial, and he was convicted and executed. The reason against admitting that evidence was much stronger than in the present case, there the prisoner came to the priest for ghostly comfort, and to ease his conscience, oppressed with guilt. Besides in this case the confidence, if any was reposed, was at an end. The confidence

was

was merely as it respected the trial then coming on, without any reference to this cause which was not then thought of, and supposing it could not be given in evidence on that trial, still it is admissible on the present, when the purpose for which it is given is at an end. *

[* 79] Lord KENYON. It is sufficient for me, sitting here, to say that this case materially differs from that cited, * but I should have paused before I admitted the evidence there admitted. The case, as it respects the Judge who determined it, is intitled to every attention from me; but this case differs from it. The Popish religion is now unknown to the law of this country, nor was it necessary for the prisoner to make that confession to aid him in his defence. But the relation between attorney and client is as old as the law itself. It is absolutely necessary that the client should unbosom himself to his attorney, who would otherwise not know how to defend him. In a case like the present it is equally necessary that an interpreter should be employed: every thing said before that interpreter was equally in confidence as if said to the attorney when no interpreter was present; he was the organ through which the prisoner conveyed information to the attorney, and it is immaterial whether the cause for the defence of which the conversation passed is at an end or not, it ought equally to remain locked up in the bosoms of those to whom it was communicated. His Lordship confessed he spoke with some doubt, but as the Plaintiff had other witnesses to call, he wished this evidence not to be received, lest a new trial should be granted on account of his having improperly received it.

The witness was permitted to reveal such conversation as he had with the Defendant in the absence of *Crossley*.

The Plaintiff obtained a verdict (a).

(a) *Vide Cobden v. Kendrick*, 4 T. Rep. 431. *Wilson v. Rastal*, *ibid.* 753, and *Duffin v. Smith*, *post* 108.

* BAKER and Others v. CHARLTON.

[* 80]
Thursday,
July 28th.
At Guildhall.

ASSUMPSIT on a bill of exchange by the indorsees against the Defendant as one of the drawers, the other drawers having become bankrupts.

If several persons trade under a particular firm, and some, without the concurrence of others, draw bills under that firm, all are liable to an indorsee.

The bill was drawn in the firm of "*James King and Co.*" under which firm the Defendant and his partners had traded. It also appeared that there were other partnerships carried on under the firm of "*James King and Co.*" in which the other drawers were concerned, but in which the Defendant had no share. The Defendant offered to shew that this bill was not drawn on account of the partnership in which he was concerned, but on account of one of the others; and that he knew nothing of it.

Lord KENYON was of opinion that the Defendant was nevertheless liable; he had traded with the other partners under that firm, and persons taking bills under it, though without his knowledge, had a right to look to him for payment. His Lordship said it was an imprudent thing for a man to enter into partnership with any person unless he had the most im-

plicit confidence in his integrity. He remembered Lord *Mansfield* mentioning a case where a gentleman of great fortune had lent a sum of money to a house, and was to receive interest according to the profits of the business, he had no idea, at the time, that this constituted him a partner, but it was so determined; and he was absolutely ruined, though he never inter-
 • [* 81] * meddled in the management of the business (a). *One partner may pledge the credit of the other to any amount (b).*

Verdict for Plaintiffs.

(a) *Vide 2 Black. 1001.*

(b) *Vide Willet v. Chambers, Cowp. 814.* This must be understood as applicable only to the case of a person who thinks he is dealing with both partners, for if *A.* and *B.* are in partnership, and *A.* becomes indebted on his separate account to *C.* he cannot

make *B.* liable to *C.* by accepting or drawing a bill in the partnership firm. Both law and justice concur in preventing the commission of so gross a fraud. See *Barber v. Backhouse, ante, 61*, and *Pirkney v. Hale, 1 Salk. 126, Swan v. Steele, 7 East. 210.*

WHITE v. BOULTON and Others.

The proprietors of a mail coach are answerable for any injury happening to a passenger through the misconduct of their driver.

THIS was an action against the Defendants, who were proprietors of the *Chester* mail coach; for the negligence of the driver, by reason whereof the coach was overturned, and the Plaintiff's arm broken. The action was in *assumpsit*; the declaration stated that the Defendants were proprietors of the coach, and that in consideration the Plaintiff had paid them
 three

three guineas for his carriage, they undertook to carry him safely &c.

The Plaintiff having proved his case, *Mingay*, for the Defendants, said that he was told a case of *Harris* and *Wilson* had been tried before Lord *Loughborough* at the *Common Pleas Sittings* after *Easter Term* last, in which his Lordship had held that the proprietors of a mail coach were not answerable for the negligence of their servants; saying that those coaches were not under the government of the proprietors, but the concern of the public, being established merely for the conveyance of letters; and therefore if any person travelled in them, he went at his own risk, and the law implied no promise for his safety.

Lord KENYON said he was certain that no such determination had ever been made by Lord *Loughborough*. It was too absurd to enter into the head of any man. Doubts had been entertained by great lawyers in the last and beginning of the present century, whether the post-master-general was liable for letters sent (a). He would not deliver any opinion on that point, as it had nothing to do with the present case; for when these coaches carried *passengers*, the proprietors of them were bound to carry them safely and properly. [* 82]

The Plaintiff had a verdict, and £60 damages.

(a) See *Lane v. Sh. Robert Cotton and Another*. 1 Lord Raym. 646, &c. This question was laid at rest by the case of *Whitfield v. Fletcher v. Braddick*, 2 Bos. and Lord Le Despencer et al. Comp. Pul. N. R. 182. no action would lie against any member of the post-office, unless he had been personally negligent.

PHILP v. SQUIRE.

No action lies for harbouring the Plaintiff's wife where she is kept by the Defendant from a principle of humanity, to secure her from the ill treatment of her husband.

THIS was an action on the case for harbouring the Plaintiff's wife after notice from the Plaintiff not to do so.

It appeared that the Plaintiff's wife came to the house of the Defendant (to whose wife she was related) and *represented herself* to have been very ill used by her husband, who, she said, had turned her out of doors. Upon this representation the Defendant received her into his house, and, at her request, suffered her to continue there after he had received notice from the husband not to harbour her. It was not proved that the husband had in fact ill treated his wife.

[* 83] Lord KENYON. The ground of this action is that the Defendant retains the Plaintiff's wife against the *inclination of her husband, whose behaviour he knows to be proper; or from selfish and criminal motives. But where she is received from principles of humanity the action cannot be supported. If it could, the most dangerous consequences would ensue, for no one would venture to protect a married woman. It is of no consequence whether the wife's representation was true or false. This kind of action materially differs from that for harbouring an apprentice, the ground of the action in that case being the loss of the apprentice's service.

The Plaintiff was nonsuited (a).

(a) *Vide Winsmore v. Greenbank, Willes 577.*

ROBERTS and Another, Assignees &c. v. DOXON.

THIS was an action of trover brought by the Plaintiffs to recover a quantity of goods which they contended had been delivered to the Defendant by the bankrupt *Cooke* in contemplation of bankruptcy.

Morden, August 1st, At Guildhall. Though a witness cannot give evidence of the particular contents of written accounts, yet he may speak to the general balance without producing them.

The bankrupts were *Cooke* and *Kilner*. *Cooke* was also partner in another house with one *Wilkinson*, and two commissions had issued, one against *Wilkinson* and *Cooke*, the other (under which the Plaintiffs were chosen assignees) against *Cooke* and *Kilner*.

One of the assignees under the commission against *Wilkinson* and *Cooke* was called as a witness, to prove that *Wilkinson* and *Cooke*'s debts, a little time before their bankruptcy, amounted to a much larger sum of * money than their credits. He produced no papers, but said he collected his information from having inspected their accounts.

[* 84]

Lord KENYON thought that though he could not state the particulars of the books without producing them, yet that he might speak to the general amount, not by saying that one page was so much and another so much, but what from his general observation he perceived to be the general state of their accounts.

Verdict for the Plaintiff.

ROTHEROE and Others v. ELTON.

ASSUMPSIT on a policy of insurance on the Plaintiffs' goods on board the ship *Jesse* of *Port Glasgow*.

An owner of a ship is not a witness in an action on an insurance of goods put on board that ship until released by the Plaintiff.

The

The question in the cause was merely a matter of fact, whether the ship was sea worthy or not.

The Plaintiffs called the owner of the ship as a witness to prove that she was staunch.

Erskine objected that he was interested in the event of the cause, he comes to exonerate himself from the action, which the Plaintiffs will have against him if they fail in this action: for the law would imply a warranty on his part that the ship was staunch.

[* 85] *Gibbs*, for the Plaintiff, answered that it was determined in the case of *Bent* and *Baker* (a) that a witness was competent in all cases, except where the verdict to be given in the cause would be evidence for or against him, and that the verdict in the present cause could not be evidence in an action by or against the owner.

LORD KENYON. The case of *Bent* and *Baker* was determined on sound principles, but it was there held that the witness was incompetent, not only in those cases where the verdict in the cause would be evidence for or against him in another suit, but also where he was directly interested in the event of the suit. This witness is directly interested in the manner mentioned by Mr. *Erskine*.

The Plaintiff then released the witness, and recovered a verdict (b).

(a) 3 Term Rep. 27.

(b) In a cause of *For v. Lushington*, tried before his Lordship at Guildhall, at the Sittings after *Fillary Term* 35 Geo. 3. a similar objection was made to the depo-

sition of *Barry* the master and sole owner; and no release being offered his deposition was not read. See also *Salk.* 287. pl. 22. 2 *Lord Raym.* 1007.

16

CASES IN K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER MICHAELMAS TERM,

32 GEORGE III. 1791.

HALL v. ELLIOT, Executor of ELIZABETH COD-
DON, Widow, who was the Executrix of her late
Husband PATRICK CODDON, deceased.

*Tuesday,
Nov. 29, 1791.
At Westminster.*

ASSUMPSIT for goods sold and delivered to the
testator *Patrick Coddon* in his life-time.

A man who pos-
sesses himself of
the effects of the
deceased under
the authority,
and as agent for
the rightful ex-
ecutor, cannot
be charged as
executor *de son
tort*.

The Defendant pleaded that the testator *Patrick Coddon* made his will and appointed *Elizabeth Coddon* and *Rowland Conyers*, executrix and executor thereof, that they both proved the will, and afterwards *Elizabeth Coddon* died and that *Rowland Conyers* was still alive. And the Defendant further says, "that he never did, as the executor of the said *Elizabeth Coddon* who was the executrix of the said *Patrick* as afore-
said, administer any goods or chattels &c.

* The Réplication traversed this last averment.

[* 87]

Lord KENYON stopped the counsel upon the open-
ing of the pleadings, and said he thought this action
could

could not be maintained. Here is a surviving executor who has acted, and he alone is answerable. If the Defendant has possessed himself of any goods, he is answerable to the surviving executor for them, and that executor must distribute them amongst the creditors.

Wigley for the Plaintiff, cited *Read's* case, 5 Co. 33. which he contended shewed that this action might be supported, though he admitted that an action would also lie against the Defendant at the suit of *Conyers* the surviving executor; and Mr. *Bower*, who was also of counsel for the Plaintiff, observing that the objection was on the record, Lord *Kenyon* said he would permit the cause to go on, though he had no doubt in his own mind that the action could not be maintained, as it was impossible there should be a lawful executor, and an executor *de son tort*, at the same time. (a).

The cause accordingly proceeded, but *Conyers* the surviving executor proving that the Defendant acted * as agent for him, and accounted with him, for the money he received, the Plaintiff was nonsuited.

[33]

(a) In the second resolution in *Read's* case it is said, that if an executor is made, and proves the will, and then a stranger takes goods claiming them for his own, he is not executor of his own wrong; because there is another executor whom the creditor may charge: but although there be an executor who administers, yet if a stranger takes the goods and

claiming to be executor, pays debts &c. he may for such express administration be charged as executor of his own wrong. The third resolution was that where the Defendant takes the goods before the rightful executor hath taken upon him or proved the will, he may be charged as executor of his own wrong.

BLACK v. SMITH.

THIS was action of *assumpsit* on a special promise to pay the plaintiff (a mariner) more than the ordinary wages in consideration of his undertaking a voyage from *Hambro'* to *Newcastle*.

The Defendant had pleaded a tender, and paid money into court sufficient to cover the ordinary wages.

It appearing that this promise was extorted from the Defendant by the mutinous conduct of the mariners; this part of the case was given up (a), and the only question was, whether a legal tender had been made. The like promise had been made to the other sailors, as to the Plaintiff, and several of them had also brought actions against the Defendant; but before the commencement of the present action, the Plaintiff and several other sailors being in the same room, the Defendant offered them as much money as was sufficient to pay all the crew their legal wages. but did not distinguish the particular sum due to each. The amount of the whole money offered was about £11, the debt due to the Plaintiff £1. 5s. All the sailors present refused to receive less than the money promised them, and upon hearing this, their resolution, the Defendant did not produce the money, which he had ready to pay them.

Wednesday,
November 30,
At Guildhall.

If A. be indebted to several persons in different sums of money, and when they are all assembled together, tender them *one gross sum*, sufficient to satisfy all their demands, which they refuse to receive, *insisting on more being due*, this is a good tender. It is not necessary to produce the money tendered when the creditor insists on more being due.

[* 89]

(a) Vide *Harris v. Watson*, ante 72.

Garrow for the Plaintiff, objected that this was not a good tender, he said this was like the case of a Bank note of £500 being tendered to pay the debt of £100 and the change being demanded. This would surely not be a good tender.

Lord KENYON. This is true in part, though not wholly so. I take it to be clear beyond a doubt, that if the debtor tenders a larger sum of money than is due, and asks for change, this will be a good tender, if the creditor does not object to it *on that account*, but only demands a larger sum. I think that the tender made in this case was a good one, they were told there was enough to pay all, and they objected to receive it, because they wanted more. There is no occasion to produce the money if the creditor refuses to receive it on account of more being due.

Verdict for the Defendant (a).

(a) *Fide Wright v. Reed*, 3 Term Rep. 554. *Douglas v. Patricks*, *ibid.* 689, and *Cole and Another v. Blake*, *post* 170. In the case of *Dickenson v. Snee*, 4 Esp. Cas. 67. Lord Kenyon is reported to have said there should be an offer to pay, by producing the money, unless the Plaintiff dispenses with the tender by expressly saying, that the Defendant need not produce the money, as he would not accept it; for though the Plaintiff might refuse the money at first, yet if he saw it produced he might be induced to accept it. So in *Thomas v. Evans*, 10 East. 101, the Defendant having left £10 with his clerk to pay the Plaintiff, the clerk on the Plaintiff calling and demanding a larger sum, told him that the Defendant had left £10 for him, *but did not offer it*, and the Court held this to be no tender. Mr. J. Le Blanc said, "There must either be an actual offer of the money by one party or a dispensation of such offer by the other."

WHITE v. EDMUNDS and Others.

Thursday,
Dec. 1st
At Westminster.

ASSAULT and false imprisonment.

The Defendants justified the imprisonment on account of the Plaintiff having made a noise and affray.

* It appeared, that one *Weeks* was walking along the *Strand* by the defendant *Edmunds*' door between 11 and 12 o'clock at night, and there spoke to a woman who retreated back and claimed the protection of the Defendant *Edmunds*. That *Edmunds* thereupon spoke to *Weeks*, desiring him to walk on and not insult the woman; but he, instead of attending to this desire, answered *Edmunds* with abusive language calling him scoundrel, &c. and collecting a croud about his house, on which *Edmunds* charged the watchman with *Weeks*. While the Defendants were conveying *Weeks* to the watch-house, the Plaintiff came up and interested himself in his cause. He, with others, went into the watch-house, and was there some time using abusive language to the Defendant *Edmunds*; they at length came to very high words; and the Plaintiff was desired to go out of the watch-house; *Weeks* put his back against the door, and in a riotous manner insisted on his being permitted to stay; and the Plaintiff continuing his abuse, *Edmunds* also charged the other Defendants (who were the watchmen) with him.

Lord KENYON was of opinion, that these facts afforded a sufficient justification of the Defendants' conduct.

If when a man is apprehended, and in the custody of officers of justice, a third person espouses his cause, and encourages the prisoner to resist, the officers may imprison such third person.

[* 90]

duct. When a man is in the custody of the officers of justice no other person has a right to interfere. If the Defendants apprehended *Weeks* for a just cause, he should have been left to them, and they not interrupted in the execution of their duty; if he was taken illegally, the officers must answer it at their peril. In the present case the Plaintiff had entered into the cause of *Weeks*, he therefore made himself liable for any misconduct of *Weeks*. *Weeks* himself made a riot by shutting the door and insisting on the Plaintiff being *permitted to stay, and the Plaintiff encouraged him in it.

[* 91]

The jury found a verdict for the Defendants.

Exdun, Dec. 2.

REX v. BARTHOLOMOW NEVILLE.

A bond given by the Defendant acknowledging himself to be guilty of a nuisance, is good evidence on the trial of an indictment for a nuisance, in carrying on the same business in another place.

A man setting up a noxious business in a neighbourhood where such business has long been carried on, is not indictable for a nuisance, unless the noxious vapour is much increased by his manufacture.

THIS was an indictment for a nuisance in carrying on the business of a melter of kitchen stuff and other grease.

Amongst other evidence, the prosecutor produced a bond from the Defendant to the parish officers of the place where he before resided, acknowledging that the trade he carried on was a nuisance, and binding himself not to continue it. To lay a foundation for this evidence, the prosecutor had before proved, that the trade was carried on in the same manner at the place where he now was, as at his former residence.

Erskine for the Defendant objected to this evidence. What is a nuisance is a question of law mixed with

with fact. The Defendant may have acknowledged himself guilty of a crime which the fact would not constitute (a), and what may be a nuisance in one place will not be so in another.

LORD KENYON. Certainly what is a nuisance in one situation is not so in another. In places where offensive trades have been long carried on they are not nuisances, though they would be so in any of the *squares, or other places where such trades have not been exercised. But the Defendant having acknowledged himself guilty of a nuisance in another place, cannot object to this evidence, which will weigh more or less against him, as it shall appear this place is more or less like that where he before resided.

[* 92]

The evidence was therefore received.

Upon the whole of the evidence it appeared, that there had been manufactories, which emitted disagreeable and noxious smells, carried on in this neighbourhood for many years; and that the Defendant came into the neighbourhood about four years ago. There was contradictory evidence as to the fact of the stench being much increased by the Defendant's melting house; some of the witnesses for the Crown stating it to have made the neighbourhood much more uncomfortable; those on behalf of the Defendant saying the difference was scarcely perceptible.

LORD KENYON left it to the Jury to consider whether the noxious vapour was much increased by this addition of the Defendant. Where manufactories have been borne with in a neighbourhood for many years, it will operate as a consent of the inhabitants

(a) *Vide 1 Burr. 267.*

to their being carried on, though the law might have considered them as nuisances, had they been objected to in time; but if another man comes, and, by *his* manufacture, renders that which was a little unpleasant before, very disagreeable and uncomfortable, though it would not amount to a nuisance by itself, still he is answerable for it.

The Defendant was acquitted.

- [* 93] * Note. *Samuel Neville*, the brother of the Defendant, was also indicted, but it appearing that the manufacture had been carried on near 50 years by the Defendant's father and himself; Lord *Kenyon* directed the Jury to find the Defendant not guilty, which they did.

LAWRENCE v. WORRAL.

The Defendant saying to the Plaintiff "what an extravagant bill you have delivered me," is a sufficient acknowledgment to avoid the statute of limitations.

TO an action of *assumpsit*, the Defendant pleaded the statute of limitations.

The Plaintiff's witness proved, that in the month of *February* last, just after the bill in question was delivered; the Defendant meeting the Plaintiff, said to him, "what an extravagant bill you have delivered me," on which the Plaintiff offered to refer it to arbitration, which the Defendant refused.

Lord *KENYON* held this a sufficient acknowledgment of *some* money being due, to take it out of the statute; and on his Lordship giving this opinion, the parties agreed to refer the *quantum* of damages to arbitration (*a*).

(a) *Vide Lloyd v. Mound*, 2 T. Rep. 760.

LAW v. WELLS.

Saturday,
Dec. 3d.

THIS was an action of trover against the Defendant, who, as messenger under a commission of bankrupt, had taken the Plaintiff's goods.

A party is not obliged to produce evidence against himself though such evidence is in court, and he has had notice to produce it.

[* 94]

* The Plaintiff had given the Defendant notice to produce the proceedings under the commission. They were in Court, but the Defendant's counsel refused to produce them (a).

Lord KENYON said they were not obliged to produce them unless they chose, and mentioned a case at *Lancaster*, where Mr. J. Yates, who was the leading counsel in the cause (b), refusing to produce some muniments relating to an election at *Wigan*, the Court held he was not obliged to produce them.

Verdict for Plaintiff.

(a) In *Bateson v. Hartsink* 4 Esp. Cas. 43. Lord Kenyon would not compel the solicitor under a commission of bankruptcy to produce the proceedings when served by a creditor with a *Subpoena duce tecum* to produce them, saying they were the papers of the assignees.

seem that he sat as Judge on the trial of it; he recognized the decision, in the case of *Roe dem. Haldane and Another v. Harvey*, 4 Burr. 2484, though his opinion, in that case, was overruled by that of the other judges; who held that the party ought to produce the deed, though he had not even had notice so to do.

(b) From what Mr. J. Yates is reported to have said of this case in 4 Burr. 2488, it should

ROBINSON v. ANDERTON.

ASSUMPSIT for money had and received. The Plaintiff had succeeded the Defendant in a publick house, and paid him for some fixtures which belonged to the house, and were scheduled in the original lease, and for which the Plaintiff was afterwards

In an action for money had and received to recover back money paid to the Defendant, it is not necessary to shew that he knew he was not entitled to receive it.

obliged to pay the lessor. The Defendant had been *under-tenant* of the house, and had paid the person of whom he rented it, for these very fixtures.

[* 95] *Piggot* on behalf of the Defendant, contended that this action could not be maintained. The present * Defendant had himself paid for these fixtures, and of course thought he was intitled to sell them, and as he did not commit any fraud on the Plaintiff, he cannot in this action, be compelled to refund the money.

LORD KENYON. This action imputes nothing criminal to the Defendant, his title is disaffirmed, for it appears he has received money which he had no right to, and which he must therefore return. He may recover back the money from the person to whom he paid it, and perhaps tack the costs of this judgment to it.

Verdict for the Plaintiff. (a)

(a) *Vide Bree v. Holbeck*, Dougl. 630.

CARTER v. PRYKE.

In a question
on land-
and tenant
their rent
payable
quarterly or
half-yearly,
the ten-
lence of the
mode in which
other tenants
paid is not ad-
missible.

ASSUMPSIT for use and occupation. The Defendant pleaded a tender.

The only question in the cause was, whether the rent was payable quarterly or half-yearly? If the former, the sum tendered was not sufficient to answer the Plaintiff's demand.

The

The Plaintiff offered evidence that his other tenants, of the same description as the Defendant, (who was in indigent circumstances) paid their rents quarterly.

LORD KENYON. This is clearly no evidence in this cause, it has been solemnly determined in a trial at bar, that evidence of the custom of one manor is *no evidence of the custom of a manor adjoining. (a). [* 96]

The Plaintiff produced other evidence and obtained a verdict.

(a) See also *Turneux v. Hutchins, Corp.* 807. *Duke of Somerset v. France*, 1 Str. 654. *Peake's Evid.* [197] 210.

FELL v. BROWN, Esq.

Monday,
Decem. 5th

THIS was an action against the Defendant, a barrister, for unskilfully and negligently settling and signing a bill filed by the Plaintiff in the Court of Chancery, which bill was referred by the Lord Chancellor to the Master, for scandal and impertinence, and the Plaintiff obliged to pay the costs of that reference.

No action lies against a barrister for misconduct.

Erskine for the Plaintiff in his address to the Jury, said that he should prove this to be *crassa negligentia*, and not a mere error in judgment. If a counsel gives his opinion on any question, and happens to be mistaken, it cannot be said that he has been guilty of gross negligence; but if he is so inattentive to his duty as to blunder in the common course of business, he makes

himself liable to an action, as would also a physician for such gross misconduct.

Lord KENYON was clearly of opinion, that this action could not be supported. More objections than one, his Lordship said, might be made to it. The Court of Chancery will in such cases exert a summary power, if it is found expedient so to do (*a*); but if that Court will order the counsel to pay the costs, it does not follow that an action can be maintained.

[*97] * If this action could be supported, it would equally lie against a counsel for inserting a count in a declaration, or putting matter in a plea which ought not to be there, and which the Court should think improper and impertinent. In a case (*b*) where Lord *Weymouth* was a Defendant, the Court thought the declaration full of unnecessary matter, and ordered it to be struck out, with costs, but no one ever entertained an idea that an action could be maintained against the counsel who drew that declaration. His Lordship added, that he believed this action was the first, and hoped it would be the last, of the kind.

On this opinion, the cause was given up, and the Plaintiff nonsuited without one witness being examined; but his Lordship told the Plaintiff's counsel he would take a note of the cause, that they might move for a new trial, if they thought proper. (*c*).

(a) *Rules and Orders of Chancery* 93. *Mitford's Pleadings* 47.

(b) *Cowp.* 663. *ibid.* 737.

(c) *Kide Chorley v. Bulcot*, 4 *T. Rep.* 317. and *Turner v. Phillips*, *post.* 122. *Sed. vide* 1. *Roll. Abr.* 10. 91. where several cases are collected on this subject.

DUBERLY v. GUNNING.

Tuesday,
Dec. 6th.

THIS was an action for criminal conversation with the Plaintiff's wife.

The Court will put off the trial on the affidavit of the Defendant's attorney that a material witness is kept out of the way by the Plaintiff.

The cause stood in the paper for trial this day, and a motion was made by *Bearcroft* for the Defendant to put off the trial on an affidavit, stating a suspicion that two of the Defendant's witnesses were kept out of the way by the Plaintiff. The affidavit was made by the Defendant's attorney, who swore that he believed the witnesses were material and necessary for the Defendant's defence.

[* 98]

Erskine for the Plaintiff said, that had the question between the parties been a matter of title, which might be purely a question of law, the affidavit of the attorney would have been sufficient; but that in a case like the present, which must be entirely a question of fact, the Defendant himself should swear to the materiality of the witnesses.

LORD KENYON. I think this affidavit is sufficient. There was once a case (a) where on a question of identity, on an attainder of high treason, the Court, before they would put off the trial, required the Defendant to swear that he was not the same person. How far that case was relished at the time the public opinion of it since has shewn. It has never since been considered as a precedent, or at all acted under.

The trial was put off. (b).

(a) *Mr. Charles Radcliffe's case*, *Fost. Rep.* 40. 1 *Black. Rep.* 3.

(b) In *Sullivan v. Mugill*, 1. II. *Blue.* 637. the Court said they would not put off the trial on the affidavit of the attorney's clerk, unless it appeared that he had the management of the cause.

Friday.
December 9th.
At Guildhall.

NEW v. CHIDGEY.

A person about whose house work has been done by the Plaintiff, is not a good witness to prove that the Defendant is liable, until she is released.

ASSUMPSIT for work and labour done and performed for the Defendant.

The Plaintiff was a paper-hanger, and had done work in the house of a lady of the name of *Le Pein*. She had employed the Defendant, and the question between the parties was, whether the Plaintiff had done this work on the credit of the Defendant, or was to look to Mrs. *Le Pein* for payment of his bill.

[* 99] * The Plaintiff proposed calling Mrs. *Le Pein* to prove that she had employed the Defendant to do the repairs of her house for a certain sum, and that he was to do all the work, and pay all the persons employed by him, amongst whom was the Plaintiff.

Erskine contended she was an admissible and competent witness. She had no interest in the event of the cause. If a verdict was given for the Plaintiff, on her evidence, she would not be discharged, for she was still liable to an action at the suit of the Defendant for money paid to her use; and her evidence in this cause, or the record in it, would not be evidence for her in that cause: she would therefore still be liable to pay the money.

Lord KENYON thought this a direct interest in the event of the cause. His Lordship said he would never wish to depart from the rule laid down in *Bent* and *Baker (a)*, that case was determined upon good con-

sideration and upon true principles, but this did not come within it.

The Plaintiff then released and examined Mrs. *Le Pein*, and on her evidence obtained a verdict. (a).

(a) *Vide Peake's Evid.* [171] 180.

HOLMES v. PONTIN.

*Monday,
Dec. 12th,
At Guildhall.*

ASSUMPSIT for use and occupation. The defence was that the Plaintiff had mortgaged the premises, and that the mortgagee had given the Defendant notice to pay his rent to him.

Where a subscribing witness is resident abroad, evidence of his hand-writing is to be given as if he were dead.

* The execution of a lease, part of the mortgagee's title, was attested by *Gwillando* and *Smith*, the former was master of an hotel at *Calais*, the other his waiter.

[* 100]

The clerk to the Defendant's attorney proved, that he had been to *Calais*, and endeavoured to persuade *Gwillando* to come to *England* and give evidence of the execution of the deed; which he refused to do. The witness then requested him to write his name, which he did in his presence, and he now swore that from his observation of his hand-writing at that time he believed the name *Gwillando*, subscribed to the deed as a witness of the execution, was his hand-writing. He further proved that he had enquired after *Smith* the other witness, and was told by his father-in-law and several other persons, that he was dead.

Mingay, for the Plaintiff, objected that this was no legal proof of the deed.

Lord

LORD KENYON. When a party is out of the reach of the process of the Court, I think evidence may be given of his hand-writing as if he were dead. This rule was first laid down by Lord *Mansfield* in a case (a) where the subscribing witness was gone to the *East Indies*: it was considered as an innovation at the time, but was found to be so beneficial that it has since been adhered to, and I am inclined to follow it in the present instance.

The lease was therefore read, and a mortgage and assignment of it proved, on which the Plaintiff was nonsuited. (b).

[* 101] * Note. Another deed was also proved, to which the Plaintiff was a party, and wherein this lease was recited; but Lord *Kenyon* said that without that circumstance he should have thought the other evidence sufficient.

(a) *Coghlan v. Williamson*, *America*, and yet it was held sufficient to prove his hand-writing. In *Wallis and Delancy*, 7 *T. Rep.* 265. *Adams v. Kerr*. 1 cited 7 *T. Rep.* 266. Lord *KENYON* held at *N. P.* that in such cases the Plaintiff should also prove the hand-writing of the obligor, but this was not urged in either of the other cases.

(b) *Vide Barnes v. Trompowsky*, 7 *T. Rep.* 265. *Adams v. Kerr*. 1 cited 7 *T. Rep.* 266. Lord *KENYON* held at *N. P.* that in such cases the Plaintiff should also prove the hand-writing of the obligor, but this was not urged in either of the other cases.

LAY v. HOLOCK.

In an action against the owner for not safely carrying corn on board his vessel, the cargo is a good title for the Plaintiff.

THIS was an action of *assumpsit* against the Defendant (who was owner of a vessel) for negligently suffering corn, sent by his vessel to *London*, to be injured.

The

The Plaintiff called the master to prove that the injury which the corn had received was occasioned by the vessel not being sea worthy. The Plaintiff had released this witness.

Mingay, for the Defendant, objected to him as an incompetent witness; if he proved the accident to have happened by the cause alledged by the Plaintiff, he exonerated himself from any liability; whereas if it should turn out that the barge was lost by the negligence of the master, he would be liable to an action at the suit of the Defendant.

LORD KENYON. He has no immediate interest: the record in this cause would not be evidence for or against him in an action brought against him; and if it should turn out that the ship was lost by the negligence of the master, still the present Defendant is liable to the Plaintiff. Therefore, taking it either way, he is a witness.

* His evidence was received, but many witnesses [* 102] proving that the vessel perished by the perils of the seas, and not on account of any defect, a verdict was given for the Defendant.

MILLER one &c. v. TOWERS.

Tuesday,
Dec. 13th.

ASSUMPSIT on an attorney's bill, and for money paid to the Defendant's use. The Defendant employed the Plaintiff to bring an action on a wager. At the trial of that cause, Lord *Kenyon* thought

An attorney cannot maintain an action even for the money out of pocket in a cause until he has delivered a bill signed.

thought the wager an illegal one, and nonsuited the Plaintiff. The Defendant complaining of the hardship of his case, the present Plaintiff agreed to take the costs out of pocket, and brought this action without ever delivering a bill.

Erskine, for the Plaintiff, contended that he might give this in evidence under the count for money paid.

LORD KENYON. I am clearly of opinion he cannot; if it were so, many beneficial consequences of the act of parliament might be avoided, for by agreeing to take the costs out of pocket, the attorney might always prevent a nonsuit when the objection was made.

The Plaintiff proved some conveyancing business, but the Defendant having a set-off to a larger amount, the Plaintiff was called. (a).

(a) The words of the statute, 2 Geo. 2. c. 23. s. 23. are, that no attorney or solicitor shall commence or maintain any action, suit for the recovery of any fees charges or disbursements at law, or in equity, until, &c. See the several cases on this subject collected *Peake's Evid.* [245.] 262.

[* 103]

* PEPPER v. BURLAND.

Where a builder agrees to erect any building for a particular sum of money, and additions are made, the builder is bound by the contract as far as it can be traced, and entitled to go on a quantum meruit for the excess only

ASSUMPSIT for work and labour as a carpenter.

The Defendant proved that the Plaintiff contracted to do all the carpenter's work necessary to be done in a house which the Defendant was building, for a certain sum. It was admitted that the roof of the house had been done in a manner different from that

that specified in the contract, and the Defendant had paid money into court sufficient to cover the excess.

A plan was produced, and proved by the Plaintiff, wherein the dimensions of the house were stated to be 15 feet; but the house on which the work was done was 17 feet. It did not appear that the Plaintiff had ever seen this plan before he began to work; but the house was begun by the bricklayer on the scale of 17 feet, before any contract was made with the Plaintiff.

LORD KENYON. I have often declared, and have had the good fortune to have my opinion adopted by Juries, that where some additions are made to a building which the workman contracts to finish for a certain sum of money, the contract shall exist, as far as it can be traced to have been followed, and the excess only paid for according to the usual rate of charging. I think that the Plaintiff has failed in shewing the plan by which he contracted to work to be the same as that produced. I admit that if a man contracts to work by a certain plan, and that plan is so entirely abandoned that it is impossible to trace the contract, and say to what part of the work it shall be applied, in such case the workman shall be permitted to charge * for the whole work done by measure and value, as if no contract at all had ever been made; but in the present case the contract is not proved to have been wholly abandoned, for it appears that the dimensions were the same when the Plaintiff contracted as they were when the building was finished; the only excess was in the alteration of the roof, and money enough to cover that has been paid by the Defendant into Court.

Verdict for the Defendant.

*Monday,
Dec. 19th.
At Guildhall.*

REX v. D' FARIA.

A party to a suit who has succeeded therein, is a good witness on an indictment for perjury committed in the course of that suit

THE Defendant was indicted for perjury committed in an answer to an allegation in the Prerogative Court of *Canterbury*. The allegation, in answer to which the perjury was committed, was exhibited for the purpose of revoking the probate of a will of one *De Sylva* made in favour of the Defendant, and obtaining probate of a subsequent will. The case stated on the part of the Plaintiff in that suit was, that the Defendant had, after the testator's decease, called on the executrix, named in the last will for the purpose, as he said, of reading it; and had then cut off the name and seal of the testator with a pair of scissors, and torn off the names of the subscribing witnesses. This case the Defendant denied by his answer, but on examination of witnesses, the Court decreed in favour of the executrix, which decree was affirmed on an appeal to the Delegates.

[* 105] * Amongst other witnesses in support of the prosecution, the widow, who was executrix and residuary legatee in the last will, was called; and on an objection being made to her competency,

Lord KENYON said, she had now no interest in the event of this prosecution, the ecclesiastical court having decreed in her favour, and established the will under which she claimed. It was true that the Crown might grant a commission of review in case the present Defendant was acquitted on the merits, but

but no objection could be made to her testimony on that account, for if such a commission was to be granted the present witness could not be examined on that cause.

The Defendant was convicted (a)

(a) *Vide Rex v. Dalby, ante, 12. and Rex v. Pepys, post 138.* It is now clearly settled that as the record could not be given in evidence, for the party injured by the perjury, he is a witness, *vide ante, 13. note (a).*

CASES IN K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER HILARY TERM,

32 GEORGE III. 1792.

*Wednesday,
Feb. 22d.
At Westminster.*

CLEVELAND, Esq. v. WILSON, Esq.

In an action for the costs of a frivolous petition against the election of a member of parliament, it is not necessary to prove either the Defendant's subscription of the petition, or a demand of the costs previous to the commencement of the action.

THIS was an action of debt, on the stat. 28 Geo. 3. c. 52. for the costs of a frivolous petition, preferred by the Defendant against the Plaintiff's election as a member to serve in parliament.

The Plaintiff proved the Speaker's certificate, and a copy of the entry on the journals of the House of Commons, of the resolution of the select committee.

Bearcroft for the Defendant objected, that the Plaintiff had not thereby made out his case. He contended, that it was incumbent on him to prove that the Defendant had signed the petition, and that the money had been personally demanded of him.

Lord

Lord KENYON thought sufficient evidence had been given. The petition must have been subscribed before it would be received (a); and the commencement of the action was a sufficient demand.

But to remove all doubt, the Plaintiff proved a demand, and on that evidence obtained a verdict.

(a) See the act, §. 23.

STORT v. CLEMENTS.

Thursday,
Feb. 23d.
At Guildhall.

THIS action on the case was brought against the Defendant for running down a brig belonging to the Plaintiff. The brig was run down by a tender, of which the Defendant was pilot and master.

A pilot who has the steering of a ship is liable to an action for an injury done by his personal misconduct altho' a superior officer is on board.

By the commission of the master, he is entrusted with the navigation of the ship under the command of his superior officer.

A witness proved that the constant practice in the navy was to leave the navigation of the ship entirely to the direction and care of the pilot; but he added that if the commanding officer were to direct the pilot to do any particular act, he must obey.

Erskine, for the Defendant, contended that the action was misconceived, and that if any person was liable to an action, it must be the lieutenant who was on board, and under whose orders the Defendant was.

[* 109]

Mingay, as *amicus curiæ*, mentioned a case of (a) *v. Brest*, at *Guildhall*, where *Mr. Taylor*, who was attorney* for one of the parties, was compelled to prove what passed at the time of the execution of the deeds; but said he believed the objection was not taken in that case.

Mr. Holdsworth, the Plaintiff's attorney, was then examined, and he clearly proving the usury, the Plaintiff was called (b).

(a) Probably *Scott, qui tam, v. 1 Lord Raym. 733.* where *Lord Brest*, reported 2 *Term. Rep. 238.* *Holt* refused to permit one who

(a) *Vide Du Barré v. Livette*, had been privately entrusted to *ante, 77. Bull. N. P. 284. acc.* make an illegal bargain, to be examined as a witness. But see an anonymous case in

BEAUCHAMP v. BORRET.

ASSUMPIT for money had and received.

The Plaintiff having purchased an annuity of the Defendant, which was void on account of the deeds not being inrolled, it was agreed, after two yearly payments had been made, that the annuity should be rescinded; and that the Defendant should pay to the Plaintiff the money paid for the purchase of the annuity, with interest from the last yearly payment. The sum paid for the purchase was £600. The annuity was £100 *per annum*.

The only question in the cause was, whether under this agreement (which was contained in a letter from the

Where an annuity is rescinded after it has been paid for some time, the purchaser is entitled to receive back his whole purchase-money.

This case overruled, 5 *Ver. jun.* 108, &c. and *Hicks v. Hicks*, 3 *East*, 16.

the Defendant), the Plaintiff was intitled to recover the whole £600 with interest from the time of the last payment, or whether the £200 which had been paid, should be deducted.

Lord KENYON was of opinion that both under the agreement and according to the justice of the case, the Plaintiff was intitled to recover the whole £600 and interest, from the time the annuity ceased, and the Jury gave damages accordingly.

* FALLON v. ANDERSON,

TRESPASS for breaking and entering the Plaintiff's house, seizing goods, &c.

The Defendant justified under a writ of *distringas* against one *Staples*, and the Plaintiff replied in the general way, without making any new assignment.

On the evidence, it appeared that *Staples* had sold goods to the value of those in dispute to the Plaintiff, which sale could not be impeached, though the Defendant attempted to shew it was fraudulent. It was also proved that *Staples* had let the shop in which the goods in question were; and some other rooms in the house, to the Plaintiff; and that goods belonging to *Staples*, which were in a different part of the house, were seized by the defendant at the time the trespass complained of was committed.

Wigley for the Defendant contended, that, as to the trespass for breaking and entering the house, the

[* 110]

Monday,
February 27th
At Westminster.
If A. be in possession of part of a house, and B. of the other part, and an officer enter into A.'s part under a writ against B.'s goods, which are not there, A. may maintain an action against the officer for breaking and entering his house, and need not make any new assignment to a justification under the writ against B.

Defendant must have a verdict for he had shewn a sufficient title to enter under the *distringas* against the goods of *Staples*; and if he also entered to seize the goods of the Plaintiff, it ought to have been newly assigned.

LORD KENYON. By the *house* mentioned in the pleadings, we must understand the shop and other part of the house in the Plaintiff's possession, that was his *domus mansionalis*, and the goods of *Staples* not being *there*, but in another part of the house, afford no justification of the Defendant's conduct in entering that part, and no new assignment is necessary.

Verdict for Plaintiff, damages £20. (*a*).

(*a*) *Vide* 3 Inst. 65. and Hale's Hist. P. C. 556 accord', but see also *Lee v. Gansel*, Cowp. 1.

[111]
Tuesday,
Feb. 28th,
At Guildhall.

* HARRISON v. WALKER and Another, Assignees,
 &c.

If *A.* fraudulently procure a bill of exchange from *B.* and afterwards become bankrupt and his assignees receive the money for the bill, *B.* may recover it from them in an action for money had and received.

THIS action for money had and received, was brought to recover back a sum of £190 10s. which had been received by the Defendants in payment of bills remitted by the Plaintiff to the bankrupts under the following circumstances.

The bankrupts, previous to their bankruptcy, had sent a bill of £193 17s. drawn by themselves on one *Dawson*, and purporting to be accepted by him, to the Plaintiff to be discounted. The Plaintiff, on the

10th of *November*, sent bills in return to the value of £190 10s. which arrived in town on the 12th, on which day one of the bankrupts absconded, the other having gone off on the 10th. It was afterwards discovered that the acceptance was a forgery, which the bankrupts knew of, and it was proved that the Defendants had received the money for the bills sent by the Plaintiff.

LORD KENYON. The assignment under the commission passes only such property as the bankrupt is conscientiously entitled to. In this case the Plaintiff had received no consideration whatever for the bills by him remitted to the bankrupt; and he is intitled to have the value of them, which the Defendant received, returned to him.

The Plaintiff had a verdict.

* REX v. MICHAEL SCHOOLE.

[* 112]

THIS was an indictment for perjury, alledged to have been committed in an affidavit of debt to hold the prosecutor (*Eiscombe Price*) to bail for £250.

The indictment stated the affidavit to have been made before *Booth Braithwaite* (the Signer of the bills of *Middlesex*) to the intent "that the sum of £250 " might be indorsed upon a certain precept called a " Bill of *Middlesex*, issuing out of the office of the Chief

Wednesday, February 29th. At Guildhall. An indictment for perjury, stating a bill of Middlesex to have issued out of the office of the chief clerk of the Court of King's Bench, is bad.

"*Chief Clerk assigned to inroll Pleas, in the Court of*
 "our Lord the King before the King himself."

Mr. *Braithwaite* was called to prove the swearing of the affidavit; and on his cross examination he said, that he was appointed by the three puisne Judges of this Court; and that his was the only office out of which Bills of *Middlesex* issued. That this office was quite distinct from, and unconnected with the King's Bench office, or office of the Chief Clerk.

Upon this *Shepherd* for the Defendant made two objections. 1st, That there was a material variance between the record and the evidence.

2dly, That taking the fact to be as stated by this record; the person who administered the oath had no authority to administer it, and it was a mere voluntary affidavit.

As to the first objection he said, that by the testimony of the witness it plainly appeared that the writ did not issue out of the King's Bench office as stated in the record. But 2dly, if the record must be taken to be true, it then appeared that *Braithwaite* had no
 [* 113] *jurisdiction, for the act of the 12 Geo. 1. c. 29. directs the affidavit to be made before a Judge of the court out of which the process issues; a commissioner duly authorized to take affidavits therein, *or the officer issuing the process or his deputy*, neither of whom had administered the oath in this view of the case; for *Braithwaite* had said, he had no connection with the chief clerk, out of whose office the precept was stated to have issued.

Erskine and *Garraw* for the prosecutor answered, that the words "the office of the chief clerk assigned to inroll Pleas," were mere surplusage, and being rejected, all would stand right. That every court would

would take judicial notice of its own proceedings, and therefore it must appear that the precept issued out of the proper office, and that the affidavit was sworn before a proper officer; for this is a process known to the law, and the witness has proved that in fact it was regularly sued out. That the court would see it could not regularly issue from the office of the chief clerk; but the substance of the allegation, namely, that that affidavit was made to the intent that a *Bill of Middlesex* might issue, was well proved, and that was sufficient.

Lord KENYON. I am of opinion it would not have been necessary to state out of what office the *Bill of Middlesex* was to issue (a), but the prosecutor having stated it to have issued out of a wrong office furnishes a fatal objection. It is impossible for me, sitting here, to say that there is not another office out of which * these precepts issue. I must take it to be as stated by the record; which is quite a different proceeding from that proved in evidence. However I will not stop the cause, but save the point, if the prosecutor's counsel seriously think they can get over the objection. [* 114]

The prosecutor's counsel were so well satisfied of the force of the objection, that, on consulting together, they consented to an acquittal.

(a) It is not usual to do so: See *Dogherty's Cro. Cir. Assist.* 476.

CALIFF and Another v. DANVERS.

ASSUMPSIT against the Defendant as a warehouse-man, for negligently keeping a quantity of *Ginseng*, which had been deposited by the Plaintiffs in

Thursday,
March 1st.

A warehouse-man is only bound to take reasonable and common care of any commodity entrusted to his charge.

in his warehouse; whereby it had been destroyed and spoiled.

It appeared that the box containing the *Ginseng* had been opened, by the Plaintiff's directions, for the purpose of shewing it, to persons who were about to purchase it. That several persons looked at it on different days, and every night the lid of the box was shut down, but not nailed. That many cats were kept in the warehouse, and all possible care taken to destroy vermin, notwithstanding which the rats had got at the *Ginseng*, and destroyed it.

Lord KENYON said, that a warehouse-man was only obliged to exert reasonable diligence in taking care of the things deposited in his warehouse. That he was not, like a carrier, to be considered as an insurer, and liable for all losses happening otherwise than by
 [* 115] * the act of God or the King's enemies; and that the Defendant in the present case, having exerted all due and common diligence for the preservation of the commodity, was not liable to any action for this damage, which he could not prevent.

The Plaintiff was nonsuited. (a).

(a) *Vide Garside v. The Proprietors of the Trent and Mersey Navigation*, 4 Term Rep. 581. where the Defendants being common carriers from Stockport to Manchester, were employed to carry hops from S. to M. to be forwarded from thence to Stockport. They carried them safe to M. and then put them in their own warehouse, in which they were destroyed by an accidental fire, before they had

an opportunity of forwarding them to Stockport. The Court held that they were to be considered as warehousemen only, and therefore not liable; but in a subsequent case of *Hide against The same Company*, 5 T. Rep. 389. where the Plaintiff resided at Manchester, and it appeared that the Defendants charged for cartage of the goods from the warehouse to the Plaintiff's house, as well

well as for the carriage of them on the canal, the defendants were considered liable for the loss arising from the same fire; though it was also proved that the warehouse belonged to the Duke of Bridgewater, that a warehouse rent was paid to him, and the cartage allowed by the Defendants to a third person with the knowledge of the Plaintiff. This case contains some important observations on the liability of carriers. Lord Kenyon held that had it not been for the charge for cartage, the Defendants would have been discharged from their duty as carriers on delivery of the goods at the warehouse; but Ashhurst and Buller, J. thought that carriers remained liable in all cases till the goods were actually delivered to the consignee.

MELLISH and Another v. MOTTEUX and Others. *Friday, March 2d.*

THE first count of this declaration stated, that in consideration the Plaintiff would buy of the Defendants a Brig, together with all the rigging, &c. belonging thereto; the Defendants undertook and promised the Plaintiffs that the Brig was free from all latent and concealed defects. The count, then stated, that she was not free from latent and concealed defects, and that the Defendants at the time of the promise *well knew the same*.

The seller of a ship is bound to disclose to the buyer all latent defects known to him.

It was proved, that the Plaintiff bought the Brig "*with all faults*," and not a word was said at the time as to her condition; but that on examination, and taking out the ballast, it was discovered that 22 of her futtocks were broken, and that had she gone to sea in that condition, her destruction would have been the inevitable consequence. That this was a *latent*

[* 116] *latent* defect, which it was impossible for any person to have discovered in the state the ship was at the * time of the purchase, and that *the Defendants knew of it*.

Bearcroft for the Defendants objected that this was a case where the rule *caveat emptor* applied, that the Plaintiffs bought the Brig for better for worse, and could not now get off their bargain.

LORD KENYON. There are certain moral duties which Philosophers have called duties of imperfect obligation, such as benevolence to the poor, and many others, which courts of law do not enforce. But in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith. This was a latent defect which the Plaintiffs could not, by any attention whatever, possibly discover, and which the Defendants knowing of, ought to have disclosed to the Plaintiffs. The terms to which the Plaintiffs acceded, of taking the ship with all faults and without warranty, must be understood to relate only to those faults which the Plaintiffs could have discovered, or which the Defendants were unacquainted with.

Verdict for the Plaintiffs, (a).

(a) *Vide Arnot v. Biscoe*, 1 *Vez.* 95. *Puffendorf* L. 5. c. 3. s. 2. 4, 5. *Grotius* L. 2. c. 12. s. 9.

CASES IN K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER EASTER TERM,

32 GEORGE III. 1792.



ADAMS v. LINGARD and Another.

*Tues'day,
May 22d
At Guildhall.*

ASSUMPSIT on several bills of exchange by the indorser, against the acceptor. (Q whether the indorser of a bill of exchange is an admissible witness to the validity of it)

The bills were dated at *Madeira*, and not stamped. The Defendants called *Carter* the drawer and indorser to prove, that, though dated at *Madeira*, they were in fact drawn in *London*, and therefore void for want of a stamp.

The Plaintiff's counsel objected to the competency of *Carter*, contending that the indorser of a bill of exchange could not be a witness to destroy it.

Lord KENYON said he wished the point to be settled in the House of Lords. "He was of opinion that the indorser was a witness proper to be heard, but other Judges were of a different opinion. There was

a case before Sir *Joseph Jekyll* many years ago; and another since, early in his attendance at *Westminster-hall*, wherein it was determined on a trial at bar (a) that three subscribing witnesses to an instrument might be permitted to deny the validity of it.

Carter was accordingly examined, and proved the fact of the bills having been drawn in *London*, and that the Defendants knew of their being so drawn.

It was then settled that the Plaintiff should tender a bill of exceptions, but the parties not having agreed on a bill, the cause came before the Court on *Tuesday* the 26th of *June*, in the following term, when a new trial was granted by consent. Lord *Kenyon* on that occasion said, that he adhered to the opinion he had given at the trial. But *per Buller J.* (b) This is a very different case from that of witnesses to a will. *Carter* had passed this *negotiable* instrument to the Plaintiff as a good and valid security, and it would be attended with consequences the most injurious to society, if these securities might be cut down by the persons passing them; it is only for two men to conspire together and cheat all the world. It is true that the witness gives an action against himself, but that may be a very different security from that which his evidence destroys. (c).

(a) *Lowe v. Jolliffe*, 1 *Black.* 365. See also *Wright dem. Clymer v. Littler* and Another, 3 *Burr*, 1244.

(b) *Absente Ashurst*, C. S.

(c) At one time it seems to have been considered as a general rule that a man who had become a party to a written instrument

should be estopped from giving any evidence to shew that it was void in its creation. (See *Walton v. Shelly*, 1. *T. Rep.* 296.) Afterwards the rule was confined to *negotiable* instruments, and an Underwriter who had subscribed a policy was permitted to give evidence to destroy its validity in

an action against another under-
writer, (*Bent v. Baker*, 3 *T. Rep.*
27.) At length a case similar to
this of *Adams and Lingard*, came
before the Court, when it was de-
termined by Lord *Kenyon*; *Grase*,
and *Lawrence, J.* against the opi-
nion of *Ashhurst, J.* that no ob-
jection could be made to the witness
on the ground of estoppel; but
that if not interested in the event
of the cause he must be admit-
ted. *Jordaine v. Lashbrooke*, 7
T. Rep. 601. See also *Rich v.*
Topping, post, 224. *

* LEE v. AYRTON One &c.

[* 119]
Finton,
May 25th,
At Westminster.

THIS was an action against the Defendant for
negligence as an attorney in suffering *Margaret*
Cogland, who was in custody at the Plaintiff's suit, to
be superseded for want of proceeding to judgment in
due time. The declaration stated that *Margaret Cog-*
land was justly and truly indebted to the Plaintiff in a
large sum of money, to wit, &c. on promises, and
that for the recovery of that debt the Plaintiff retain-
ed the Defendant, &c.

In an action
against an attor-
ney for suffering
a debtor in cus-
tody at the suit
of the Plaintiff
to be superseded,
proof that such
debtor was a
married woman
destroys the ac-
tion, when the
declaration states
that she was in-
debted.

Q. Whether a
declaration
would be good
without stating
that the original
Defendant was
indebted?

On the part of the Plaintiff *Margaret Cogland* was
called as a witness, who on her cross-examination said,
that at the time of contracting the debt she was a
married woman, living separate from her husband, but
without any allowance whatever from him.

Erskine, for the Defendant, contended that this
evidence proved that the Plaintiff had no cause of
action against the Defendant in the first action, and
therefore that he had sustained no injury by her being
discharged out of custody.

K

Mingay,

Mingay, for the Plaintiff, on the contrary insisted that the Defendant had been guilty of negligence in suffering the original Defendant to be discharged without having first obtained the consent of his client, and that he had no right to determine at his own chambers whether the Plaintiff had a good cause of action or not.

Lord KENYON. Were the declaration formed to meet the question, it might perhaps bear some argument, but this declaration sets out with stating, that [* 120] * the original Defendant was indebted to the Plaintiff. By the evidence it appears that this averment is not true, so that clearly this action cannot be maintained.

The Plaintiff was therefore called (a).

(a) *Vide Alexander v. Macaulay and Another, v. Madu-ley and Another, 4 T. Rep. 611.* and Another, *post*.

Wednesday,
May 30th.
At Guildhall.

HANSON v. ROBERDEAU.

Where an auctioneer does not disclose the name of his principal at the time of the sale, he is personally liable to an action for damages for not completing the contract.

If the conditions of sale are that a certain sum *per cent.* shall be paid as a deposit, and the auctioneer accepts a less sum, he cannot afterwards object that too little was paid.

THE Plaintiff had bought a *post obit* bond at an auction, where the Defendant acted as auctioneer, and the bond not being assigned within the time agreed upon by the conditions of sale, the Plaintiff brought the present action of *assumpsit* against the auctioneer.

The name of the principal was not mentioned at the time of the sale, and one of the conditions was, that *£25. per cent.* should be paid as a deposit; but although

although the Plaintiff was to give £645 for the bond, only £50 was paid down, which it was proved the Defendant agreed to accept as a deposit.

Two objections were taken by the Defendant's counsel. 1st. That the agreement was not complied with on the part of the Plaintiff, the whole deposit money not being paid. 2dly. That the principal, and not the auctioneer, was liable to an action.

LORD KENYON. The Defendant, after having agreed to take £50 for the deposit, cannot object that too little was paid. And though where an auctioneer names his principal, it is not proper that he should be liable to an action (a), yet it is a very different case when the auctioneer sells the commodity without saying on whose behalf he sells it; in such a case the purchaser is intitled to look to him personally for the completion of the contract.

The Jury found for the Plaintiff, damages £200, which was proved to be the value of the bond over and above the £645, agreed to be given for it.

(a) This must be understood personally liable to return it in case a good title cannot be made. *Burrough, Widow, v. Skinner*. 5 Burr. 2630.

CRANCH, Executrix, &c. v. KIRKMAN, and Others.

THIS was an action for goods sold and delivered by the testator, to which the Defendants pleaded the general issue, and gave notice of set-off for goods sold and delivered, &c.

The Defendants' set-off consisted of several items

K 2

for

Where there is a mutual unsettled account and reciprocal demands, the statute of limitations does not attach. The exception in that statute as to merchants' accounts, is not confined merely to persons of that description.

for goods, sold at different times from 1783 to 1788. The Plaintiff's demand accrued chiefly in the year 1783, but there were two small articles sold in the year 1789.

It was contended on the part of the Plaintiff that the greatest part of the set-off was within the statute of limitations, no promise being proved within six years.

[*122] * Lord KENYON said he thought this was within the exception in the statute as to merchants' accounts. He agreed that where the demand of one party arises long after the demand of the other, that shall not revive the antecedent account, but this was in the nature of a running and *mutual* account between the parties, and was precisely the case put by Mr. J. Denison, in *Cotes v. Harris*, which his Lordship said he particularly remembered, and of which he believed no one but himself had taken a note, the report of it which appeared in print (*a*) having been furnished by him.

Mr. *Bearcroft*, for the Plaintiff, contended that this exception extended to no other description of persons but *merchants*, in which he was over-ruled by Lord *Kenyon*.

The Plaintiff proving a demand beyond the amount of the set-off, had a verdict for the balance.

(*a*) *Bull. Ni. Prius*, 149, 50. *Catling v. Skoulding*, 6. *T. Rep.* 289. accord.

TURNER v. PHILIPPS, Esq.

Thursday,
May 31st.
At Westminster.

ASSUMPSIT for money had and received.*

The Plaintiff being a party in a former cause, had given the Defendant a brief to attend as one of his counsel on the trial of that cause; and the Defendant not having attended the trial, the present action was brought to recover back the fee given to him on that occasion.

No action lies to recover back a fee given to a barrister to argue a cause which he did not attend.

Lord KENYON advised an agreement between the parties, saying, that whether Mr. *Philipps* would chuse * to return the fee or not, was for his own consideration; but if the cause was to proceed he should feel himself obliged to interpose, and the parties might apply to the court, if they were dissatisfied with his opinion. His Lordship alluded to the case of *Chorley* and *Bolcot (a)*, lately decided, and mentioned the general opinion of the Profession, that the fees of Barristers and Physicians, were as a present by the client, and not a payment or hire for their labour.

[* 123]

Upon this the parties agreed to settle the cause out of Court, but *Garrow*, who held a brief for Mr. *Philipps*, said that he had not been guilty of the negligence imputed to him, for that it never was intended that he should attend the cause, but the fee was given him as a compliment for the trouble he had taken in the former stage of it.

(a) 4 T. Rep. 317. Vide *Fell v. Brown*, ante 96. the cases cited in the note on that case, and 3 Bl. Com. 28, 9.

DUNLOP v. WAUGH.*

*Finden,
June 1st.
At Westminster.*

If a man, not knowing the age of a horse, but having a written pedigree which he received with him, sell him as a horse of the age stated in the pedigree, at the same time stating he knows nothing of him but what he has learnt from the pedigree, he is not liable to an action when it appears that the pedigree is false.

[* 124]

ASSUMPSIT on a promise that a horse bought by the Plaintiff of the Defendant was only 8 years old when in fact he was 14.

The Defendant when he sold the horse shewed the Plaintiff a written pedigree, which he had received with him from the person of whom he had bought him, and said that he sold the horse according to that * pedigree, knowing nothing of him further than he learnt therefrom, the mark being out of his mouth when he had bought him. The pedigree was clearly proved to be false, but the Defendant had no knowledge of this when he sold the horse.

Lord KENYON was clearly of opinion that this was no warranty. The Defendant related all he knew of the horse, and did not enter into any express undertaking that the horse was of the age stated in the pedigree, but stated the contents of that, which the Plaintiff relied on.

The Plaintiff was nonsuited. (a)

(a) In *Jewduine v. Slade*, K. B. Sittings after Tr. Term. 37. G. 3. M. S. 1 *Esp. Cas.* 572. S. C. an action was brought on the warranty of two pictures bought by the Plaintiff, which the Defendant had represented as the works of Claude Lorraine and Tonniers; Lord Kenyon held that the ac-

tion was not maintainable unless the Defendant knew that the pictures were not the works of those masters, for by a representation of a fact like this, of which the Defendant could have no certain knowledge, he must be understood as speaking to his belief only.

CASS and Another v. CAMERON.

THIS was an action on the case against the sheriff for permitting one *Whittaker*, against whom the Plaintiff had sued out a *latitat*, to escape, and returning *non est inventus*. A man who has been arrested is a good witness in an action against the sheriff for his escape.

A doubt was at first entertained whether *Whittaker* could be a witness for the Plaintiff in this cause. But afterwards Lord *Kenyon* said, that he saw no objection to his competency, for the debt would not be discharged by a verdict and judgment in this cause, but the witness would still remain liable to an action at the suit of the Plaintiff.

He was therefore examined, but not making out the case, the Plaintiff was unsuited. (a)

(a) *Vide Rex v. Warden of the Fleet, Bul. N. P. 67.*

* MEAD v. DAUBIGNY.

[* 125]
Wednesday,
June 6th.
At Guildhall.

CASE for scandalous words. All the counts in the declaration stated the words to have been spoken in a *colloquium* with a lady of the name of *Barnston*, to whom the Plaintiff was about to be married, by reason whereof he lost his marriage, &c. In an action for words spoken to A. concerning the Plaintiff, evidence of words (not in themselves actionable) spoken to B. may be received to shew the malice of the Defendant,

After proving the words by Miss *Barnston*, the Plaintiff called another witness to prove that the Defendant had, in a conversation with this witness, used other words.

Garrow, for the Defendant, objected to this evidence. He said it was not admissible in this action, for all the counts stating the slander to have been published to a particular person, it would be manifest injustice to suffer the Plaintiff to give evidence of other conversations; for the Defendant comes here to defend himself against words spoken to that person only, and had he been aware that other words were to be given in evidence, he might have come prepared to deny or justify them.

Erskine, for the Plaintiff, answered the objection by saying, that no words could be given in evidence which were themselves actionable, and that the reason of that distinction was, not because the Defendant might not be able to answer them as he otherwise would have done, but because the Plaintiff might not have damages for those words, and then bring another action, making those very words the foundation of it. That the only intent in proving such words was to shew the *animus* and malice of the Defendant.

[* 126] * Lord KENYON. In actions for words, I have always understood that the Plaintiff may give evidence of *any* words used by the Defendant, to shew the spirit and temper by which he was actuated. I must own I do not remember any case exactly like the present, where all the counts stated conversations with one particular person, and evidence is offered of words spoken to another person; but I think that I may receive it in this case, for the only use

use of it is to shew the state of the Defendant's mind and malice towards the Plaintiff. I must however request that no evidence may be offered of words, actionable in themselves, for I am clearly of opinion that such evidence is not admissible. (a).

The Defendant called no witnesses, and the Plaintiff had a verdict and £500 damages.

(a) *Sed Vide* *Charlton and Barrett*, ante, 22. and *Jae v. Huson*, post, 166. in both which cases Lord *Kenyon* permitted other words and libels, actionable in themselves, to be given in evidence to shew the malice of the Defendants. And in *Scott v. Lord and Lady Oxford*, *Hereford Sum. Ass.* 1808, *Lawrence*, J. in like manner, permitted words, not laid in the declaration, and which were actionable, to be given in evidence in aggravation of the damages.

CASES IN *K. B.*
 AT THE SITTINGS
 AT NISI PRIUS,
 AFTER TRINITY TERM,

32 GEORGE III. 1792.

*Thursday,
 June 28th.
 At Westminster.*

ROBSON *v.* HALL.

On a wager that
 A. will trot
 2 horses 16
 miles in two
 successive hours,
 he may trot
 them in any
 manner he
 thinks proper.

THIS was an action of *assumpsit* on an agreement, whereby the Defendant "betted the Plaintiff £150 to £100, that he did not find two geldings to trot 32 miles in two successive hours, carrying the said Mr. *Robson* and no one else." It was afterwards, by an indorsement on the agreement, agreed that the bet should be doubled."

The declaration contained 1st, A count on a bet of £150 to £200. 2dly, On the first bet of £150 to £100; and lastly, a count on another bet of £150 to £100. There was but one stamp on the agreement, and the common breach for non-payment of the money was assigned on all the counts.

The Plaintiff performed the trotting within two successive hours, but in the following manner, *viz.*
 he

he trotted one horse 12 miles, then trotted the other * 4 miles, turned back to the place where he left the first horse, and completed the match by again mounting that horse, and trotting him 12 miles more. [* 128]

Mingay, for the Defendant, objected that the Plaintiff had not performed the contract. That it ought to have been performed by trotting each horse 16 miles, without stopping, which was the evident intention of the parties.

Lord KENYON over-ruled this objection, being of opinion, that the true construction of the agreement was that the Plaintiff might trot the two horses the distance, and in the time agreed upon, in any manner he thought proper.

Mingay then objected, that there should have been a 6s. stamp on each agreement, for that they were distinct and separate transactions. If two persons by an agreement in writing, lay a wager, and then by another agreement, in-

dorsed on the first, consent that the bet should be doubled, there must be two 6s. agreement stamps.

Lord KENYON was of this opinion, but said that as But if there is only one stamp the winner may recover the first bet on a count thereon. (a).

(a) In this case there was no alteration of the original agreement, which remained as if no subsequent agreement had been made. So, in *Henfree v. Bromley*, 6 East, 309. where an umpire having made his award, altered the sum after the expiration of the time for publishing it; the Court held that the alteration being a mere nullity, the award, as at first made, might be enforced. But in *French v. Patton*, 9 East, 351. the Defendant having subscribed a policy of assurance, which in the printed part was on *ship and goods*, but by a written note in the margin was restrained to *ship and out-fit*; and a memorandum was afterwards inserted in the policy, as follows, viz. "It is hereby agreed that the interest in this policy of insurance shall be on ship and goods instead of ship and out-fit as originally declared." The Court held that the original risk being so altered, the policy ceased to be a valid instrument, and that no action could be maintained upon it, either in its original or altered form, until a new stamp was impressed upon it.

the

there was a count on each agreement, the Plaintiff might recover one sum of £150 on the agreement which was stamped.

When the cause had proceeded so far, it appeared that the money betted had been deposited in a Banker's hands at the time the wager was laid, and a receipt had been given to the Plaintiff and Defendant in their joint names.

Where money betted is paid into the hands of a Banker, who gives a receipt to the persons betting as received of them; the winner cannot recover on the common count on a wager, but must state that the money was so paid, and that the Defendant refused to permit him to receive it.

[* 129]

On an objection being made that the action should have been brought against the stake holder,

* Lord KENYON said, It should have been laid in the declaration and proved in evidence, that the money having been paid into the hands of the Banker, the Defendant refused to suffer the Plaintiff to receive it from him. The money was paid in on their joint account, and one cannot get it from the Banker without the consent of the other. If the Plaintiff was to recover this money from the Defendant, he might never be able to get it out of the Banker's hands. (a)

The Plaintiff was nonsuited.

(a) *Kerr v. Osborne*, 9 *East*, 376. be sued for and recovered from the stake-holder by the party entitled to it; and not from the party who was originally indebted although he agreed to waive all objections to form.

accord. There the Court determined that the money in litigation having been by mutual consent paid over to a trustee, in trust for the party entitled, it could only

Ex dno,
June 29th.
At Guildhall.

SPENCER v. GOULDING and Another.

A book-keeper to a carrier is a good witness for him without a release.

THIS was an action against the Defendants as common carriers, for not safely carrying and conveying a parcel from *Worcester* to *London*.

The

The question in the cause was, whether the parcel was delivered according to the direction or not. The Plaintiff's witness swore that it was directed to "*Richard Spencer* to be left at the *White Bear, Piccadilly*, till called for." The Defendants called witnesses to prove that it was directed to "*Elizabeth Spencer* to be left at the *Black Bear, Piccadilly*," and that it was accordingly left there.

The first witness they called was their book-keeper at *Worcester*, who was objected to as an interested witness; and no release was produced.

Lord KENYON thought him a good witness, *of necessity*, without any release; and he was sworn and examined.

* The cause being clearly with the Defendants, they, [* 130] at the recommendation of Lord *Kenyon*, and in compassion to the poverty of the Plaintiff, agreed to withdraw a juror. (a)

(a) *Vide Bul. N. Pr.* 289. *Peake's L. Ev.* 159.

MARCH v. WARD.

ASSUMPSIT on a promissory note made by the Defendant and one *Bowling*, in the following words; viz. "I promise to pay three months after date, to *Wm. March*, £8 5s. for value received in fixtures.

"*Robert Bowling*."

"*Thomas Ward*."

Saturday,
June 30th.
At Westminster.

A promissory note signed by two persons, and beginning "*I promise, &c.*" is joint and several.
See *Mansel v. Burrell*, 7 T. R. p. 552. as to joint, and several promises.

It

It was objected that this promissory note was joint only, and not several.

LORD KENYON. I think that this note, beginning in the singular number, is several as well as joint, and that the present action may be maintained on it. I remember a case tried before Mr. Moreton at Chester exactly similar to the present, wherein I was counsel for the Defendant; I persuaded the Judge that it was a joint note only, and the Plaintiff was nonsuited (a), but on an application being afterwards made to this Court, they were of contrary opinion, and a new trial was granted. The letter *I.* applies to each *severally*.

Verdict for the Plaintiff.

(a) Note. This is now held to be only matter of abatement, *Cowp* §32.

Quere. Whether a covenant by the lessee of a public house that he and his assigns will buy all their beer of the Plaintiffs is binding on the assignee. A man is not obliged to accept a conveyance when the title is doubtful.

THIS was an action of *assumpsit* on an agreement to take a public house.

At the time the parties were treating about the house, the Defendant's appraiser was proceeding to examine the lease, when the Plaintiff stopped him, and said he need not trouble himself as the lease contained nothing but the usual and ordinary covenants, and the house was a *free house*. In consequence of this, the appraiser desisted from further examining the lease,

lease, and the Defendant entered into the agreement on which the action was brought.

The Plaintiff was not the original lessee, but the persons who had assigned the lease to him were brewers, and had procured a covenant to be inserted in the assignment, that the Plaintiff, his executors, administrators and assigns, should deal with them and purchase at their brewery, all the beer consumed in the house. No such covenant was inserted in the original lease.

Lord KENYON said, he would not now determine, nor was it necessary to do so, whether this was a binding covenant on the assignee. He thought it a question of some nicety, but whether it was or not, he thought it equally a defence to this action. When a man buys any commodity he expects to have a clear indisputable title, and not such a one as may be questionable, at least, in a court of law. No man is obliged to buy a law suit.

Verdict for Defendant.

* REX v. HUBE and Others.

132

THIS was an indictment on the Toleration Act, 1 W. & M. c. 18. for *maliciously and contemptuously* disquieting and disturbing Protestant dissenters in the exercise of their religious worship.

Parol evidence, of the oaths required by the Toleration Act having been taken, is not admissible. It is not necessary to prove the taking of those oaths in an indictment for disturbing the congregation.

The prayers were read in German, and the congregation was composed of Lutherans, some of them natives

natives of *Germany*, and the rest *Englishmen* descended from *German* parents.

The prosecutor (who was preacher at this meeting-house) proved that it was duly registered; and he swore, that when the congregation was singing the hymns, the Defendants, forcibly entered the chapel, pulled the clerk out of the desk, &c. The record of the oaths was produced, and all the formalities required by the statute appeared to have been observed, except the declaration, which did not appear on the record. The prosecutor swore that he had taken all the oaths.

Lord KENYON said, it was matter of record, and therefore could not be proved by parol evidence (a), but that he did not think it necessary to prove the taking of any of the oaths. The preacher was liable to a penalty for not doing so, but it did not disqualify him from acting.

German Lutherans are within the protection of the Toleration Act.

It is no defence to an indictment on that act, that the Defendant entered the chapel for the purpose of asserting his right to the clerk's reading desk.

[* 133]

The prosecutor's case being closed, *Piggot*, for the Defendants, stated their case, which he said was as follows, *viz.* That two of the Defendants were elders of the chapel, and that the third had, till the day on which the fact complained of was committed, been, * and acted as clerk thereof. That on that day, the preacher having appointed another clerk, he with several other persons, entered the chapel through the preacher's house, before the public door was opened, and the new appointed clerk seated himself in the desk, the others also seating themselves in different pews. That then they began the ceremony, and when they had proceeded through some part of it, they opened the public doors, on which the Defendants

(a) *Salk.* 281.

entered; and requested the clerk to leave the desk, and the others to leave their pews; which they refusing, the Defendants pulled them out by force.

He contended that the Defendants were entitled to an acquittal on two grounds. First, That this was not a meeting-house within the act of parliament. Secondly, That the facts of this case did not constitute that offence, which it was the object of the statute to prevent.

As to the first. Before the Act of Toleration there were many acts of Parliament, all which meant to destroy conventicles contrary to the established church. These were all virtually repealed by the 1st of *W. & M.* which act could only have in view the persons liable to punishment under the previous acts of parliament. By the 22 C. 2. c. 1. it was enacted, " that " if any person of the age of 16 or upwards, *being a* " *subject of this Realm*, shall be present at any " assembly, conventicle or meeting, under colour or " pretence of any exercise of religion, &c." it shall be lawful for any justice of the peace to make a record of the offence, and to impose the penalty therein mentioned. These persons were not *subjects of this* * *realm*; and therefore are not within the act of parliament. [* 154]

As to the second objection. This is a place of worship for *Foreigners* in a foreign language. The Defendants claim a right in it, which they complain has been invaded, and they come to prosecute their claim. They do not therefore come in the language of the act, *maliciously or contemptuously*. The persons whom the statute meant to punish, were those,

who violently oppose a form of worship not suitable to their own ideas.

LORD KENYON. As to the first objection generally said, he would save the point for the opinion of the Court if the Defendants wished he should do so, but that he had no doubt in his own mind, and was clearly of opinion that this was a meeting-house within the act of parliament. The facts stated by way of defence could be no answer to this prosecution. Whether the prosecutor and his party were right or wrong could not be considered on this trial. The conduct of the Defendants was highly indecorous and improper. If they had a legal right they might obtain redress in a Court of justice. Instances might be put where it would be considered extremely indecent for a man to exert such a right. In the Church of *England* a parson might be instituted and inducted to a living, but for want of a proper presentation he might not have a legal title. Should it be said that another clergyman having a better title, might enter into a place which mankind hold sacred and *manu forti* pull him from the pulpit? No, If he has the right his patron may bring a *quare impedit* or *quare incumbrauit*, * which-ever is suitable to his case. So here the Defendants might have applied to this Court for a *mandamus*, or to the Court of Chancery as the case might require.

[135]

The Defendants' counsel also objected that by the 18th *sec.* of the act the indictment should have been tried at the sessions. In the present case the indictment had been there found, but removed by the prosecutor: it was agreed that this point should also be saved for the opinion of the Court; subject to which the Defendants were convicted.

Note.

Note. On this last question, the Court in *Hilary* Term, 34 Geo 3. gave judgment for the prosecutor. See 5 Term Rep. 542.

FISH v. SCOTT.

THE Defendant had indicted the Plaintiff for an assault, on which indictment the Plaintiff had been found not guilty, and this action was brought for a malicious prosecution of the indictment.

If *A.* strike *B.* and *B.* return the blow, on which *A.* indicts *B.* for an assault, the bare fact of *A.* having struck the first blow is not sufficient to support an action for a mali-

Erskine, for the Plaintiff, stated that the Defendant first assaulted the Plaintiff, and the Plaintiff having returned the blow, the parties by agreement went to an adjoining field, where they settled their quarrel by a regular boxing match. Notwithstanding this the Defendant indicted the Plaintiff.

Upon which opening Lord *Kenyon* stopped the cause, saying it was not enough to support this action, that the party indicted was justified in returning the blow that he had received, or that the other had * been guilty of the first assault. There must be something more. Though the Plaintiff was justified in defending himself from the Defendant's assault, it was still an assault, and there was probable cause for the prosecution. Besides, both parties here joined in a deliberate breach of the peace by retiring into the field and fighting.

[* 136]

The Plaintiff was nonsuited without examining a witness.

Saturday,
July 7th.

LAWRANCE and Others v. DIXON.

The Fleet books
are admissible
evidence on a
question of pedi-
gree.

THIS issue was directed by the Court of Chancery, to try whether the Plaintiffs were nephews and nieces of *Elizabeth Hall*, deceased.

The only disputed fact in the cause was the family of *Elizabeth Hall*. On the part of the Plaintiffs, it was contended that her maiden name was *Lawrance*, and that she was sister to the father of the Plaintiffs. The Defendants on the other hand contended that she was descended from a family of the name of *Wright*.

Amongst other evidence the Plaintiffs produced (by a witness who said he had purchased them) the *Fleet* books, wherein the marriage of *Daniel Hall* and *Elizabeth Lawrance* was entered to have been celebrated on the 7th of *May*, 1737.

[* 137] Lord KENYON said, he received this evidence with great doubt. There was a tradition in *Westminster-hall*, that when the books of the *Fleet* were produced * before Lord *Hurdwicke*, he would not receive them in evidence, but cut them to pieces in court. After so great an authority had declared against them his Lordship said, he could not receive them without some hesitation, but that he was inclined to think that, in a *pedigree cause*, they were admissible, though by no means such evidence as ought to be favourably received (a).

(a) *Vide Reed v. Passer and Others, post*, 231. See also *Peake's Law Evi.* [87.] 89.

After

After much evidence had been given, it plainly appeared that *Elizabeth Hall* was sister to the Plaintiff's father, that in the early part of her life she went to live with a gentleman of the name of *Wright*, assumed his name, and passed in the world and amongst his relations as his niece; in consequence of which, she after his death received a distributive share of his personal estate. At her death she disposed of her fortune by will, giving £1000 to the Plaintiffs, and after giving other legacies, appointed the Defendant her executor. The Plaintiffs had filed a bill in the Court of Chancery for the surplus of the personal estate, as being her next of kin, and in consequence of the doubts occasioned by her having passed as the niece of *Wright*, the present issue was directed.

The Jury found for the Plaintiff.

When the cause was over, Lord *Kenyon* said, he was extremely clear that the Court of Chancery would order the Defendant (who was the next of kin to *Wright* the intestate) to retain to the full amount of the money which he had been defrauded of by this imposture of the testatrix. (a).

(a) *Vide* the Doctrine of Election, 1 *Brown, C. Cases* 587.

* REX v. PEPYS, Esq.

[* 138]

THIS was an indictment for perjury, said to have been committed in an answer to an amended bill in the Court of Chancery. The bill

Tuesday,
July 10th.

It is no objection to the competency of a witness on an indictment for perjury committed

ted in an answer in Chancery, that in his answer to a cross bill filed by the Defendant he has sworn the fact which he is to prove on the indictment.

Was

was filed by one *Knight* and *Elizabeth* his wife against the Defendant and his wife, for the purpose of redeeming some mortgaged premisses, the equity of redemption whereof had been assigned by *John Hill* to *Francis Hopping*, late husband to the Plaintiff *Elizabeth Knight*, and by him devised to her.

If in answer to a bill filed by A for redemption of land assigned to him by B. Defendant swears that he had no notice of the assignment, and therefore insists on taking another bond due from B. to his mortgage (a) this is a material fact on which perjury may be assigned.

The bill stated the mortgage of the premisses in question to one *Thomas Triquet* for £600, and a subsequent mortgage of other premisses for £500 and £200, for all which sums *Hill* gave his bond, that *Hill* assigned to *Hopping* as above-mentioned, and that *Triquet* by his will bequeathed the mortgaged premisses to the Defendant, and his wife who was *Triquet's* daughter. (b).

(a) *Vide Ambler*, 733.

(b) I have been informed by the gentlemen who acted as solicitors for the Defendants, Messrs. *Dobie* and *Thomas*, that there is a little inaccuracy in the statement of the facts of this case, which I take this opportunity of correcting. The statement communicated by them to me is as follows:—*Hill*, in Aug. 1777, made a mortgage by two several deeds of equal date of certain leasehold houses in London, to *Triquet*, for securing the respective sums of £500 and £200, and at the same time executed two several bonds, by way of further security. In Nov. 1777, *Hill*, by two other deeds of equal date, mortgaged to *Triquet* several

leasehold houses in Surrey, for the respective sums of £360 and £240, making together £600, and gave another bond to *Triquet* for the same. *Hill* in the same year assigned to *Francis Hopping* the equity of redemption, of all the mortgaged premisses, and *Hopping* covenanted with *Hill* to pay off the whole of the principal money and interest. After *Hopping's* death his widow, the prosecutrix, assigned the insufficient estate to *Dunning* who was insolvent. The Plaintiffs filed their bill for a redemption of the premisses in Surrey. The Defendants by their answer insisted that the houses in London were an insufficient security, and that the Plaintiffs must redem

The answer stated that the assignment from *Hill* to *Hopping* was made without the privity or consent of the Defendant, and that he knew nothing of that transaction. Upon this answer the bill was dismissed, and on it the present prosecution was founded.

The Defendant had also filed a bill against *Knight* and his wife to foreclose the equity of redemption, in the answer to which the wife had sworn that the Defendant did consent to, and was acquainted with the assignment of the equity of redemption to *Hopping*.

Elizabeth Knight was called as a witness for the prosecution.

**Erskine* objected to her on account of interest. If [139] it was a material fact in the Court of Chancery whether the Defendant was privy to the assignment or not, she ought not to be permitted to give evidence in this cause, for she having sworn directly contrary in her answer, will be intitled to dismiss the Defendant's cross bill if she succeeds in this cause, and convicts him of the perjury imputed to him; so that in this respect she has a direct interest in the event of the cause. But he contended that this fact on which the perjury was assigned was not a material fact, and said he was informed the Chancellor had so decided when he dismissed the prosecutor's bill, for whether the Defendant consented to the assignment or not, he had still a right to retain the premisses till all the money due on the bond, as well that for which

redeem both estates or neither; and that the London estate was assigned to *Dunning* without his knowledge. Upon this the Plaintiffs amended their bill, charging the Defendant with notice of the assignment to *Dunning*, and upon the denial of this notice it was that the perjury was assigned.

these

these premisses were mortgaged, as that for which the other mortgage was made, was paid. The Defendant could not be deprived of this right unless he formally renounced it by deed.

Lord KENYON. I think there can be no objection to this woman's testimony: her own answer will be no evidence for her in the Court of Chancery, other evidence must be adduced before she can prove her case there, so that she has no immediate interest. The fact on which the perjury is assigned is a material fact; mere knowledge has often been held sufficient to bind in equity, and the consent need not be by deed. There is one case (a) in the books which was thought [* 140] * peculiarly hard at the time, where a son was held to be affected with notice, by only attesting the execution of some deeds by his father. Which-ever way it is taken, I think this woman is a good witness.

She was examined, but the Defendant was acquitted without calling a witness, the prosecution appearing in a very odious light to both Court and Jury.

(a) See 1 *Vez.* 96. also *Mocatta & al' v. Murgatroyd*, 1 P. W. 393. But in the case of *Becket v. Cordley*, (*Bro. Cha. Rep.*) 353. Lord *Thurlow* thought the case of *Mocatta and Murgatroyd* went too far in imputing notice to the first mortgagee

upon the mere circumstance of his being a witness to the second mortgage, since it is in common practice for persons to attest the execution of deeds without being made acquainted with their contents.

LAROCHE, Bart. and Others v. WAKEMAN, Esq.
and Another.

TROVER for a vessel or trow, called the *Experiment*, and her tackle, &c. which the Defendant *Wakeman* as Sheriff, and the other Defendant as Plaintiff, in an action against one *Smith*, had seized under a *fieri facias* in that action.

If an uncertificated bankrupt carry on trade and sell a vessel to *A.* he has a good title against all persons but the assignees.

Before the seizure *Smith* had, by a bill of sale, assigned the vessel in question to the Plaintiffs in trust for one *Walker*, who had paid a valuable consideration for it. At the time of this assignment *Smith* was an uncertificated bankrupt, but had the possession of the vessel, and carried on trade on his own account, and without any molestation by his assignees.

* *Mingay*, for the Defendant, objected that this vessel was the property of the assignees, and therefore that *Smith* could give the Plaintiffs no title.

[* 141]

LORD KENYON. If the assignees of *Smith* take any steps to disaffirm his title, they may do so (*a*), but if

(*a*) *Evans & al' v. Munn*, Comp. 570. *Vide Chippendale v. Tomlinson*, 1 Co. Bank. Law. 518. In *Ashley v. Kell*, 2 Stra. 1207. the Court held "that though under 5 Geo. 2. c. 30. the future effects of a bankrupt against whom two commissions had issued, were liable to be seized for the benefit of his creditors, yet the bankrupt had in the mean time such a pro-

perty in them as enabled him to transact business, and sell to a *bona fide* purchaser." See also *Webb v. Fox*, 7 T. Rep. 391, *Fowler v. Down*, 1 Bos. and Pul. 44. where the Court held that the bankrupt himself might maintain trover, and confirmed this case of *Laroche v. Wakeman*.— But in *Kitchen v. Bartsch*, 7 East 53. it was determined, that to an action

they do not, he being the ostensible owner may convey a title to the Plaintiffs, subject to be disaffirmed by them, but it is not competent to third persons to make this objection. I think I remember a case of this kind.

The bill of sale of vessels for inland navigation need not be registered.

It appeared that the vessel was at the time of the sale lying in the *Thames* at *Abingdon*, that she was decked, and went from *London* to *Droitwich*, &c. but it did not appear that she had ever been at sea, though she was frequently in the *Severn* where salt water came.

Upon this, *Mingay* objected that the bill of sale should have been registered pursuant to Lord *Hawkesbury's* act (b).

LORD KENYON. These are vessels for inland navigation only, and are not within the intent and meaning of my Lord *Hawkesbury's* act, which was made for a very different purpose.

Both these objections being over-ruled, the parties agreed to refer the quantum of damages to Mr. *Lowten*.

action of *assumpsit*, at the suit of the bankrupt on a promissory note for money lent by him, the Defendant might plead that he had not obtained his certificate, and that the assignees required the Defendant to pay the money to them; and that a Replication, saying the cause of action occurred

after the bankruptcy, and that the Defendant treated with the bankrupt as a person capable of receiving credit, was no answer to the plea.

(b) 26 Geo. 3. c. 60. Vide *Rollstone and Others v. Hibbert and Others*, 3 Term Rep. 406.

BALCETTI v. SERANI and Another.

Friday,
July 13th.
At Guildhall.

[IN this action, which was brought by the Plaintiff as indorsee against the Defendants as acceptors of a bill of exchange, the Defendants attempted to prove that the acceptance was a forgery of *Latilla* the drawer, who had been clerk to the Defendants.

In an action against the acceptor of a bill of exchange who defends himself on the ground of his acceptance being forged by A. evidence that A. forged his acceptance to another bill and absconded on that account is, not admissible.

Several witnesses were called, who swore that they did not believe the acceptance to be the hand-writing of either of the Defendants, and pointed out the difference between this and other acceptances of the Defendants. To corroborate this testimony, the Defendant's counsel called a witness to prove that *Latilla* had forged the Defendants' name to another acceptance, and had absconded to avoid the consequence of prosecution for that offence.

The Plaintiff's counsel objected to this evidence being received.

Erskine and *Garrow*, for the Defendants, contended it was admissible. Though not of itself evidence, yet coupled with the evidence before given, it tended to shew that the probability of truth was in favour of those witnesses who had sworn they did not believe the acceptance to be the Defendant's hand-writing, and much fortified their testimony. *Garrow* mentioned the case of one *Lambe*, who was tried in *Surrey* for forgery. The offence charged upon him was forging a bank note. The note in question was found to have been traced with a camel-hair pencil, and amongst other evidence, to fix the offence upon the

the Defendant, drawings by him in *India* ink of the *Britannia &c.* of a bank note were produced. This they contended was similar to the present case.

BULLER, J. (who to-day sat for Lord *Kenyon*) said he thought the case cited was not in point; there the charge was against the person in whose custody the papers were found; and they were connected with the particular fact with which the prisoner was charged. But in this case the Plaintiff is an innocent indorsee, and the evidence offered only goes to affect the general character of *Latilla*, but does not touch this particular bill.

The Plaintiff recovered a verdict (a).

(a) *Vide Graft v. Lord Brownlow Bertie. Peake's Evid.* [103] 105.
Note (c).

CORDRON v. Lord MASSERENE.

A sheriff's officer who discharges a Defendant on payment of the sum sworn to, and is afterwards obliged to pay the residue of the debt, may recover it from the Defendant as money paid to his use.

ASSUMPSIT for money paid, laid out and expended. The Plaintiff being a sheriff's officer had arrested the Defendant on a writ against him. The writ was indorsed for bail for £306. 11s. (the sum for which the bond was given), and on the Defendant paying the Plaintiff this money and the costs, he discharged him. The sheriff was afterwards called upon to return the writ, and the Plaintiff in the original action insisting on being paid his interest, the present Plaintiff paid that money to prevent an attachment

ment being sued out against the sheriff. The present action was brought to recover this money.

The Defendant's counsel contended that this action could not be maintained. 1st. They said that this * payment was merely voluntary. The Plaintiff had [144] not been compelled to pay it, nor could he, for he was not liable to more than the sum sworn to, 2dly. That this was within the rule laid down in *Eyles* and *Faikney (a)*, for the Plaintiff had no authority to dis-

(a) *EYLES v. FAIKNEY, K. B.*
Easter Term, 32 Geo. 3.

The Defendant being a prisoner in the custody of the Plaintiff (who was warden of the Fleet prison) on mesne process at the suit of one *Holland*, a written authority came from *Holland* to the Plaintiff to discharge the Defendant out of his custody, but *Molloy*, the Plaintiff's deputy, having doubts as to the authenticity of the discharge, applied to *Holland* to know whether it was his hand-writing. *Holland* confessed that he had signed the paper, but said that he had been imposed on by the Defendant, and therefore countermanded the authority. The Defendant insisted that the authority to discharge him was irrevocable, and threatened *Molloy* with an action if he detained him; and *Molloy* thinking that *Holland* could not revoke his order, discharged the Defendant out of his custody. *Holland* af-

terwards brought an action in the Common Pleas against the Plaintiff for an escape, and recovered a verdict and £300 damages, to recover which money the present action was brought as for money paid, laid out and expended to the use of the Defendant.

The cause was tried before Lord *Kenyon*, at *Westminster*, and his Lordship being of opinion that the Plaintiff had been guilty of a breach of his duty in permitting this Defendant to escape, and therefore ought not to be permitted to come as a Plaintiff into a court of justice, ordered him to be called.

On a former day *Holroyd* had moved for a new trial, and obtained a rule to shew cause, which rule coming on, *Law* and *Holroyd* contended that this was not a voluntary but a negligent escape. They cited *Moore, 597*, to shew the difference between a voluntary and a negligent escape, and contended that though the Plaintiff's

charge the Defendant without the consent of the Plaintiff in the former action, or his attorney.

Plaintiff's ignorance of the law was no answer to *Holland's* action, yet it shewed that he did not suffer the Defendant to escape from a corrupt motive, and therefore he ought to recover in the present action. In the case of *The Sheriff of Norwich v. Bradshaw*, Cro. Eliz. 53, and Godb. 125. the Court held that a sheriff from whom a prisoner had escaped, might maintain an action immediately after the escape, though no action had been brought against him.— Though *Holland* had not, yet he probably might have recovered the whole of his debt against the present Plaintiff. This would have been a discharge of the Defendant for the whole debt, and the present verdict is a discharge *pro tanto*. In a case which arose some years since, the Court held that the recovery of a penalty against a servant, was a bar to any action against the person who seduced him from his master's service. See *Bird v. Randall*, 3 Burr. 1345. So it has been held that if an action is brought to recover treble damages for not setting out tithes, the Plaintiff cannot afterwards bring an action to recover the tithes, Sir *Richard Champenon v. Hill*, Yelv. 63. Had the Plaintiff voluntarily permitted

the Defendant to escape, on a promise to pay him a sum of money, or to indemnify him, it would have been a very different case, for the Plaintiff would have been guilty of a gross violation of his duty. But even supposing this to have been what the law calls a voluntary escape, still they contended that the Plaintiff might recover this money. In a case of *Morris and Bulkley*, tried before Mr. J. Yates, at *Worcester Lent Assizes*, 1765. that Judge held that if a sheriff voluntarily permitted a prisoner to escape, he might recover the money which he was obliged to pay, in an action against the prisoner for money paid to his use, and Mr. J. Gould was of the same opinion.

Erskine, for the Defendant, shewed cause against the rule. He observed that to make an escape voluntarily it was not necessary that the gaoler should have a corrupt intention, if it was by his consent, it was sufficient. No escape could be called merely negligent, unless effected by the pure act of the prisoner, without the knowledge, and against the consent of the gaoler. *Ex dolo malo non oritur actio*. He was proceeding, when he was stopped by the Court, who said, "the rule must be discharged."

In

BULLER J. This is not a voluntary payment, the Plaintiff would have been obliged to pay the whole sum due, by law, for though bail above cannot be * charged with more than the sum sworn to, yet it is [* 146] not so with the sheriff or the Defendant, against whom the Plaintiff may recover the whole of his debt (b). To bring this within the case of *Eyles* and *Faikney*, the Defendant should shew some improper conduct in the Plaintiff, and then I admit the rule that a Plaintiff must draw his justice from pure fountains would apply: but if I were to determine that the Plaintiff had done wrong in this case, I must say that a sheriff's officer could not in any case receive the debt and costs and discharge the Defendant, which might be attended with very mischievous consequences to Defendants.

Verdict for the Plaintiff. (c).

In *Pitcher v. Bailey*, 8 East, 171. The Court, on the authority of this case of *Eyles v. Faikney*, determined that a sheriff's officer who permitted the Defendant to go at large on his bare promise to pay the debt to the creditor, in consequence of which he (the officer) was obliged to pay, could not recover it from the original Defendant.

(b) *Gabel v. Perchard*, Anstr. 522. *Foulds v. Muckintosh*, 1 H. Blac. 233.

(c) *Vide Rogers v. Reeves*, 1 T. Rep. 418.

GRELLIER v. NEALE and Others.

Saturday,
July, 14th.
At Guildhall.

ASSUMPSIT for goods sold and delivered. The goods were sold to *William Neale* the first Defendant, and *Redhead*, in whose names the business was

If the Defendant's hand-writing to a deed is proved, the Jur. may presume the sealing and delivery.

was

was carried on, but the Plaintiff discovering that the other Defendants were dormant partners, brought this action against all.

[* 147] * To prove a partnership deed, the Plaintiff's counsel called the subscribing witness, who said she did not see the deed executed, but that *William Neale* brought it to her, and desired her to put her name thereto as a subscribing witness, which she did, none of the other Defendants being present. The Plaintiff's counsel then offered to call witnesses to prove the hand-writing of the other Defendants, which the Defendant's counsel objected to; contending that as it was a deed under seal, bare proof of the hand-writing was not sufficient, but sealing and delivery must be proved.

LORD KENYON. The subscribing witness not having seen the deed executed, it is the same as if there was no witness at all; and in that case the hand-writing may be proved by another witness. As to the objection that the sealing and delivery ought to be proved, I am clearly of opinion, that if the signature is proved to be the Defendant's hand-writing, we ought to presume that it was sealed and delivered. (a).

The Plaintiff then proved the hand-writing and obtained a verdict.

Mr. *Beardcroft*, one of the Plaintiff's counsel, said it was a point which had been frequently ruled.

(a) *Vide Dougl.* 206. *Fasset and Another v. Brown*, ante 23. acc. *Bull. N. P.* 254, *contra*. See the cases collected, *Peake's Law Evid.* [98] 100.

SMITH v. The Company of ARMOURERS and BRAZIERS of the City of London. *Monday, July 16th*

A Mandamus had issued to the Defendants, commanding them to admit *Edward Smith*, the Plaintiff, a freeman of the company of Armourers and Braziers.

A man who has been engaged as a chief clerk and manager to a manufacturer for seven years, but served a sufficient apprenticeship with the 5 Eliz. though he was never engaged in the manual labour of the business.

To this *mandamus* the Defendants returned, that the said *Edward Smith* was not duly qualified to be admitted a freeman, not having served an apprenticeship according to the stat. of *Elizabeth*. The Plaintiff pleaded to this return and joined issue thereon.

It appeared, that the Plaintiff had never been bound apprentice, nor even worked at the trade. He in the year 1775, went to live with Messrs. *Thoytes & Co.* who were very large founders in the city, as clerk and packing porter, he continued with them for 15 years during the greatest part of which time he conducted the whole of their extensive works, received all the orders, gave directions to the workmen, &c. but never was engaged in the manual labour of the business. All the witnesses said he knew how to conduct the business as well as any master in *London*, but that he did not know how to manufacture the commodity by his own personal labour. During some part of the time he was with Messrs. *Thoytes & Co.* he was under articles of agreement, but such articles were never for a longer term than 2 years, at the end of which time they were renewed.

It was objected by the Defendant's counsel, that this

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was

[* 149] was not a sufficient apprenticeship to entitle the Plaintiff, by the general law of the land, or the customs of the city, even to exercise his trade; and therefore that he could not be admitted of the company.

Lord KENYON. I am of opinion, that there has been a sufficient apprenticeship within the stat. of the 5th of *Edw.* to entitle this person to exercise his trade. When that act was made, those who framed it might find it beneficial, but the ink with which it was written was scarce dry, ere the inconvenience of it was perceived; and Judges falling in with the sentiments of policy entertained by others, have lent their assistance to repeal this law as much as it was in their power. Very soon after this statute was made, the Duke of *Alva's* persecutions in the *Netherlands*, under that monster *Philip* the Second, brought over an immense source of industry to this country; all the manufacturers being driven from their own. Then the inexpediency of this statute was sufficiently felt, and so strictly has it been construed, that it has even been determined that a man carrying on *one* business for seven years without any effective prosecution, has served a sufficient apprenticeship to enable him to carry on, not only that one trade (*a*) but *any* other. There is no particular custom stated in this case, so that it must entirely rest on the statute; and I am clearly of opinion he is not within it. The reason for making it was, that bad commodities might not be spread abroad; but natural reason tells us, that if the manufacture is now good, there is no danger of its

(a) *Vide* *Walter qui tam v. Holton*, 1 *Black.* 233. *French qui tam v. Adams*, 2 *Wils.* 168. *Regina v. Maddox*, *Salk.* 613. 4 *Leon.* 9.

having a favourable reception in the world, or answering the tradesman's purpose.

Verdict for the Plaintiff. (a)

(a) *Carth.* 163, *Show*; 242. A wife who has assisted her husband seven years may carry on trade. And *Peaks v. Johnson*, *Hil. 1 Ann.* cited *B. N. P.* 193.

*CATLEY and Another v. WINTRINGHAM. [* 150]
Tuesday,
July 17th.

ASSUMPSIT against the Defendant, as master of the ship *Betsey*, for not safely conveying a quantity of tallow from *St. Petersburg* to *London*, and delivering it to the Plaintiffs there.

The Plaintiffs were consignees of the tallow in question; and the ship having arrived in the *Thames*, they sent a lighter to fetch the tallow from her. The lighter came on the *Saturday*, but the lighterman was then told, by the people on board the ship, that the tallow could not be put on board till the *Monday* following, at which time they desired him to call for it. He left the lighter lashed to the ship and went again on the *Monday*, but not above half the tallow being put on board, he again left the lighter. In the following night the lighter was cut from the ship and part of the tallow, to the value of £82, stolen thereout.

By the custom of the river *Thames* the master of a vessel is bound to guard goods loaded in to a lighter, sent for them by the consignee, until the loading is complete, and cannot discharge himself from that obligation by telling the lighterman he has not sufficient hands on board to take care of them.

The Plaintiffs were proceeding to call witnesses to prove that, by the custom of the river, the lighters were left by the side of the ship till completely loaded,

and that the captain of the ship was obliged to watch them during that time; but they were stopped by the Jury (which was a special one) who said they well knew the custom to be so.

In answer to this case, the Defendant proved that when the lighterman came on the *Monday*, he told him he could not guard the lighter, not having a sufficient number of hands on board for that purpose, but the lighterman left the lighter without returning any answer.

[* 151] * Lord KENYON. The custom of the river must undoubtedly govern the parties. There might have been a special contract, limiting the Defendant's duty, but he could not do that by any act of his own without the consent of the other party. (a).

Verdict for the Plaintiffs.

(a) *Vide Strong v. Nataly*, 1 Bos. and Pul. N. R. 16. where a policy being made on goods "until the cargo should be discharged and safely landed;" the goods were put on board a lighter and brought to the wharf of the consignee, but not landed on account of the rough weather. The consignee then discharged the lighterman, and undertook to see to the landing himself; and the lighter being afterwards sunk and the goods thereby lost, it was held that by this act of his own the consignee had discharged the underwriters, who would otherwise have continued liable.

Wednesday,
July 18th.

TIDSWELL v. ANKERSTEIN.

An executor in trust has a sufficient interest to enable him to make assurance in his own name, on the life of a person who has granted an annuity to the testator.

THIS action was brought on a policy of insurance on the life of *Wm. Holden*, late *Shuttleworth*, from the 17th of *August* 1790 to 17th of *August* 1791, both days inclusive, and during the life of the Plaintiff;

Plaintiff; but in case the Plaintiff should depart this life before *Wm Holden*, the policy to be void.

Holden had granted an annuity to the Plaintiff's late brother; which annuity he had bequeathed to persons not parties to this insurance, having made the Plaintiff executor of his will, and directed him to make assurance.

Erskine for the Defendant, objected that the Plaintiff had not such an interest as enabled him to insure this life. The real interest is in the persons to whom the annuity is bequeathed, and the act of parliament (a) directs, that all insurances shall be made for the benefit of the person interested. Here the insurance is made by a person having no beneficial interest; and had the Plaintiff died before the person whose life is insured, the insurance would have been gone.

* Lord KENYON said, he thought this a sufficient interest to support the action. The Plaintiff should not assent to the legacy before the testator's debts were paid, without being guilty of a *devastavit*, and being executor, all the interest of the testator vests in him. [* 152]

The cause proceeded, but it appearing that *Holden* was in a dying state when the policy was effected, the Defendant had a verdict. (b).

(a) 14 Geo. 3. c. 48, s. 1, 2, 3. whom the legal estate was vested,

(b) In *Pritchett v. Waldron*, 5 might maintain an action against the hundred for the riotous demolition of a house.

CASES IN K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER MICHAELMAS TERM.

33 GEORGE III. 1792.

*Monday,
Dec. 3d
At Westminster.*

WELLER v. The GOVERNORS of the Foundling Hospital.

Mere trustees of
a public utility
are good wit-
nesses in an ac-
tion brought
against them
in their cor-
porate cap-
acity.

ASSUMPSIT for work and labour. The Plain-
tiff had been employed to dig a well and to put down
a pump at the Hospital. When the pump had been
put down, the water was very bad, and the only
question in the cause was, whether the water was
spoiled and made fetid by the wooden pump, or whe-
ther it was bad from any other cause. If the former
should be found to be the case, the Plaintiff had
agreed to take back the pump.

Most of the witnesses called on behalf of the De-
fendants were Governors.

Mingay, for the Plaintiff, objected to their compe-
tency, not on the ground of interest, but because they
were Defendants on the record.

Lord

Lord KENYON was of opinion, that they were nevertheless good witnesses. His Lordship said they were sued in their corporate, and not in their natural and individual capacities. That this case was different from the case of a Mayor and Citizens, because though sued in their corporate name, they might still have a great interest in the event of the cause, for instance, a citizen of London had great and important rights to support, but these Defendants had not the least personal interest; they were mere trustees of a public charity.

The Defendant's case was clearly proved, and Lord Kenyon being of opinion, that the Plaintiff was entitled to be paid for digging the well, though not for the pump; it was agreed to refer the question, whether a sufficient sum of money had been paid the Plaintiff, to arbitration (a).

(a) But in *Rev v Saint Mary Magdalen, Bermondsey* 3 Last 7 where certain persons being by act of parliament appointed Governors and Directors of the Poor, and made liable upon appeal against the rate to the payment of costs in case of the appeal being allowed, were holden not to be witnesses in such appeal, though they were, in truth, only Trustees, and entitled to be reimbursed such costs out of the parochial fund for being parties in the cause they were individually liable to costs in the first instance. *Indic' Pleas' Law* Lind [149] 157

GRAHAM and Others v. HOPE and Others.

*Test 19,
Dec 4th.*

THE Defendants had been in partnership together, and the Plaintiff had sold them goods as partners. Afterwards the partnership was dissolved,

When partners dissolve their partnership, they should send notice to all persons who have trusted them as

partners, a notice in the *Gazette* is not sufficient to discharge them as against those persons who have not seen it.

and notice of the dissolution given in the *London Gazette*; and after this notice, the Plaintiff had sold and delivered the goods for which the present action was brought.

The Defendants called witnesses, who swore that a notice had been given to the agent of the Plaintiff, that the partnership was dissolved. The agent on
 [* 155] * the contrary positively swore that he had received no such notice.

LORD KENYON told the jury, that the cause depended entirely on the credit they gave to the witnesses on the one side and the other. The *Gazette*, he thought, was not *of itself* sufficient notice to the Plaintiff of the dissolution of the partnership. His Lordship said he did not say this for the purpose of this cause merely, but meant to lay it down as a general rule to govern the conduct of all men. Many people there were in this kingdom who never saw a *Gazette* to the day of their deaths, and very mischievous would be the consequences if they were bound by a notice inserted in it. It was incumbent on persons dissolving a partnership, to send notice of such dissolution to all the persons with whom they had had dealings in partnership.

The Jury, believing the Defendant's witnesses, gave a verdict for the Defendants. (a).

(a) *Vide Gorham and Another v. Thompson and Another*, ante 42. which seems at first sight to imply that the mere publication of an advertisement in the *Gazette*, is sufficient proof of notice in all cases; and the same doctrine is to be collected from Mr. Espinasse's note of *Godfrey v. Turnbull and M'Cauley*, vol. i. page 371. though according to my note of that case, the extent of the determination was, that the publication in the *Gazette* might be left to the Jury as evidence of notice; but was not conclusive

conclusive of that fact. The notes of that case so materially differing, I insert mine verbatim, as taken at the time.

CODRIPP v. MACAULEY and Another, *Guildhall*, Sitting after Trinity Term, 35 Geo. 3

Assumpsit on a promissory note

The note in question was dated 6th of April, 1793, and made by the Defendant *Macaulay*, in the partnership name of *Macaulay and Co.* in consideration of a sum of money then advanced to *Macaulay*. *Macaulay* had suffered judgment by default, the other Defendant had pleaded the general issue.

Previous to the time that this note was given on the 19th March, 1793, the Defendants had dissolved their partnership, and in the *Gazette* of that day an advertisement of such dissolution was inserted.

Fiskine, for the Plaintiff contended, that the *Gazette* was not of itself conclusive evidence of the Plaintiff having had notice of the dissolution and cited *Graham v Hope*, but Lord Kenyon saying he agreed in opinion, that the *Gazette* was not conclusive, he did not state the circumstances of that case.

It appeared that the Plaintiff lived in *London*, and took in two daily Papers, but not the *Gazette*.

Lord KENYON said, that the *Gazette* was not evidence of notice any more than any other newspaper, unless in the cases where, by Act of Parliament, it was directed to be conclusive, such as bankruptcies, decrees of the Court of Chancery and others, some of which even extended to make a man guilty of felony or treason. But in all cases, if published in the neighbourhood of a person, it ought to be left to the Jury, whether he had notice of it or not. His Lordship said, he remembered a case on the Circuit at *Hereford*, where a large sum of money was offered in an advertisement, for apprehending a felon; it was proved that the newspaper, which contained the advertisement, was circulated in the neighbourhood of the person in whose name it was published. It was left to the Jury to determine whether he knew of it, and they found for the Plaintiff. So here, if it is probable that the Plaintiff saw this *Gazette*, it may be ground for the Jury to find for the Defendants. The Defendants were not obliged to give actual notice to every person in the world. The Jury will consider whether the Plaintiff knew of it or not.

Verdict for Defendant.

Friday,
Dec. 7th

REX v. M'CARTHER.

If a witness who is a Scotch covenantor be sworn on the testament, and afterwards at the desire of the counsel, according to the ceremonies of his own country, he may be indicted as having sworn on the testament.

THIS was an indictment for perjury committed on the trial of an information in the Exchequer, against one *Gibb* for concealing soap.

The indictment stated, that the Defendant was sworn upon the holy gospels of God. It was proved, that the Defendant was first sworn on the Testament, in the usual form, but the *Solicitor General* understanding that the Defendant was a member of the kirk of *Scotland*, desired he might be sworn by holding up his hand (a), and the oath was so administered.

Garrow, (who at the desire of Lord *Kenyon* took the defence on himself, the Defendant not having any counsel) objected, that this was a fatal variance. The indictment should have stated, that he was sworn by holding up his hand, for though he was first sworn in the usual way, it was not under the sanction of that oath he gave his evidence, and therefore he could not be indicted for perjury on that oath.

Lord *KENYON* observed, that the indictment would have been sufficiently certain, if it had only stated the Defendant to have been in due manner sworn. If the Defendant had only been sworn according to the form of *Scotland*, this would have been a good objection; but as in the present case the Defendant had suffered himself to be sworn in the usual way without objection on his part, he would not suffer him by acting the hypocrite, to escape punishment.

The Defendant was convicted.

(a) *Vide Mee v. Reid, ante 23.*

BERRY

BERRY and Another v. BANNER and Another.

*Mundan,
Dec. 10th.
At Westminte*

THE Plaintiffs declared in prohibition, and by their declaration alledged, that "there was, "and from time whereof the memory of man, &c. * "had been within the parish of *St. Martin in the Fields* in the county of *Middlesex*, a vestry of the said parish, composed of *a certain number of select* persons parishioners and inhabitants of the said parish [* 157] "for the time being, called a *Select Vestry*; which "said *select vestry* for the time being, during all the "said time immemorial, on *Easter Monday* in every "year, had been accustomed to nominate and elect, "and of ancient right and custom ought to nominate "and elect, two parishioners and inhabitants of the "said parish, to be and serve the office of church- "wardens of the said parish, of *St. Martin in the Fields*, for one year then next ensuing; which said "persons, being parishioners and inhabitants of the "said parish, so nominated, elected and chosen by the "said *select vestry*, and none others, had, for and "during all the time aforesaid, been duly sworn into, "and served and executed, and by right of custom "ought to have served the office of church-wardens of "the said parish." The declaration further stated, that the Plaintiffs were duly elected church-wardens by the select vestry, sworn into that office, and were entitled to sit in a pew in the parish church, appropriated for the use of the church-wardens; nevertheless, that the Defendants had wrongfully drawn the Plaintiffs into a plea in the Spiritual Court; claiming a right

On an issue whether a church-warden ought to be elected by the select vestry, a record between a former church-warden and another person is admissible evidence.

If in pleading, it is stated, "that "from time immemorial there "had been a select vestry "composed of a "certain number "of select persons," it is incumbent on the party making that averment to prove that the vestry has consisted of a definite number.

So if it had been stated that the vestry was composed of a certain select number of persons *comme semble*, A select vestry cannot be constituted by a faculty from the Bishop.

a right to the said pew as church-wardens of the said parish.

The Defendants pleaded the general issue; and for a writ of *consultation* said, that the right of election was in the parishioners at large, and that they were elected by them, and duly sworn into their office, and traversed the custom set out in the declaration.

[* 158] * The Plaintiffs, as a part of their evidence, offered the copy of a judgment in this Court, in *Trin.* term 14th & 15th G. 2. between *Wm. Kendal* and Sir *Henry Penrice*, the Official to the then Archdeacon of *Middlesex*. That was an action for a false return. The Plaintiff *Kendal* and one *Tucker*, had been elected by the parishioners at large; and the select vestry had chosen the said *Tucker* and *Wood*. But the right of election then being disputed, Sir *Henry Penrice* refused to swear in either set of church-wardens, and left them to apply to this court for a *mandamus*, which they accordingly did, and both obtained writs. The Official swore in *Tucker* and *Wood*, and to the *mandamus* to swear in *Tucker* and *Kendal*, returned that he had already sworn in *Tucker* and *Wood* as the church-wardens elected by the vestry. Upon which *Kendal* brought the action, and upon the trial, a verdict was found for the Defendant.

Erskine, for the Defendants, objected that this being *res inter alios acta*, could not be evidence in this cause.

Lord KENYON. I am clearly of opinion it is evidence. I will not say whether it is *conclusive* or not. In questions of custom, such evidence is always admitted. If a right of common is claimed under a custom, and one person brings an action, the record
in

in that cause is evidence between other parties (a). If any fraud can be shewn that will destroy the effect of it; but if unimpeached, it is evidence very near conclusive, if not quite so.

* The Plaintiffs also proved a copy of judgment in [* 159] *Hilary term 1744*, on a feigned issue, between *Ferrers* and *Nind*, “whether there then was, and from time, &c. had been a vestry of the said parish, composed of a *certain* select number of persons parishioners of the said parish for the time being.” Which was found in the affirmative.

Many entries in the parish books from the year 1625 to 1700, were read; from all which it appeared that the vestry was select, but that sometimes a *larger* and at other times a *smaller* number of the inhabitants attended.

Erskine here objected, that though the Plaintiffs had proved that there was a select vestry, yet it was not proved that the vestry was composed of any *certain* definite number, but that on the contrary all the evidence shewed that the number was indefinite.

Bearcroft, for the Plaintiffs, endeavoured to answer the objection by saying, that the word *certain*, did not oblige the Plaintiffs to prove a definite number. That the sum and substance of the allegation was, that there had been a select vestry. But that which-ever way it was taken, there was evidence to go to the Jury, for that the words of this record, that the vestry was composed of a *certain* number of *select* persons, were synonymous with those used in the record between *Ferrers* and *Nind*, that it was composed of a *certain select* number of persons.

(a) *Carth.* 181. *Bull. N. P.* 233.

* Lord

Lord KENYON said he thought it was an objection which could not be got over ; upon which the Plaintiffs called a witness to prove that the select vestry had for some time consisted of 49.

[* 160]

* The Defendants then proved a faculty from the Bishop of London, dated 28th of June, 1662, whereby he granted and confirmed to them that they should be a select vestry to consist of 49. They also examined some witnesses to prove that it was generally understood in the parish that the number of 49 was only established by the faculty.

Bearcroft, in his reply to the Jury, still contended that no precise definite number need be proved to sustain the issue. Suppose this had been in *Latin*, as legal proceedings formerly were, it would have been *quidam numerus*, this means no more than “ a number”, but lawyers when expressing that in *English*, could not so well do it, without literally translating it, and saying a *certain* number. When we speak of a *certain* man in telling a story, we mean some human being, but no one particular person. He then contended, that the evidence he had adduced, proved that a vestry consisting of 49 existed before the faculty was granted ; and that if this was an averment, that the vestry was composed of a *settled, definite* number, the record in the former cause equally contained such an averment.

Lord KENYON (to the Jury). At the time I interposed, I had an idea that the Plaintiffs on this issue, must prove that the vestry consisted of a *certain* number. I still retain that opinion. The question for you to consider is, whether the Plaintiffs have made out a *certain* number. There are some things respecting

specting the good government of the church, which belong wholly to the ordinary; the disposal of seats, where there is no prescriptive right, the ordering of * devotion, &c. But by the common law, all the parishioners who pay scot and lot have a right to be of the vestry. By immemorial custom this right may be restrained to a select number, and it is highly convenient in populous parishes that it should be so; but still it cannot be done but by immemorial custom. The faculty *proprio vigore*, is a dead letter, though it may be evidence of the antecedent right. Mr. Bearcroft very properly got up and said he would give proof of a *certain* number, and admitted that the faculty was not sufficient of itself. The word *grant* in the faculty seems to introduce something new, but the word *confirm* supposes an antecedent custom. I have no doubt but there is a select vestry; the only question is whether there is any slip in the proceedings. I am not sure that there is any difference in the words of these two records; I rather think the former verdict is evidence of a *certain* select number. In 1625, persons were elected in the place of persons dead, it therefore shews a *certain* number, or why say, in the *place* of others. If you think the *faculty* only, fixed a *certain* number, you must find for the Defendants: If the verdict in 1744, and the other evidence prove a *determinate* number from time immemorial, the Plaintiffs are intitled to your verdict. It is for you to decide.

The Jury found a verdict for the Plaintiffs (a).

(a) Vide 4 Burn's Eccl. L. 8, 9.

Wednesday,
Dec. 12th.
At Guildhall.

AITCHESON and Another v. MADOCK, Gent.
One, &c. and Another.

Hair powder made of starch ground fine, still remains starch; and packages of more than 28lb. weight removed from one place to another must be marked as starch.

THIS action of *assumpsit* was brought against the Defendants for negligence as attornies in commencing an action against excise officers, for seizing a quantity of hair powder, belonging to the Plaintiffs, without giving the previous notice required by law.

The declaration stated, that before the making of the promise, a large quantity, to wit, &c. of hair powder belonging to the Plaintiffs had been *unlawfully* seized by the officers; and in consideration that the Plaintiffs would retain and employ the Defendants as their attornies, to bring an action against the persons who had made the seizure, they promised to conduct themselves properly, &c.

The Plaintiffs proved that the powder in question, which had been brought in hogsheads from *Scotland*, to *England*, was in fact seized.

The Defendants' counsel objected, that it was not proved the seizure was unlawful. In answer to which Lord *Kenyon* said, he would presume the seizure unlawful until the contrary was proved.

The Defendants then proved that the powder was in fact nothing more than starch ground fine, without any other ingredient. By the act of the 24 Geo. 3. c. 48. s. 4. it is enacted, that "when any starch exceeding the quantity of 28lb. weight, shall be removed or carried by land or water, the word
" starch

“ *starch* shall be painted or marked in legible letters
 “ of at least three inches in length on every chest,
 “ *cask*, sack or package, wherein such starch shall be
 “ * contained, and any starch exceeding, &c. which [* 163]
 “ shall be found removing, or carrying, or removed or
 “ carried by land, &c. in any chest, &c. not having the
 “ word *starch* so painted or marked thereon, shall be
 “ forfeited, together with the chest, &c. containing the
 “ same, and the boat or vessel, horses or other cattle,
 “ waggon, &c. made use of, in removing or carrying
 “ the same ;” and this powder not being so marked,
 the Defendants’ counsel contended, that it was subject
 to seizure, and the averment that it was *unlawfully*
 seized was disproved.

The Plaintiffs’ counsel insisted, that though nothing was added to the starch, it had still become another article, and therefore need not be marked.

LORD KENYON said, it still remained starch ; and his Lordship said he believed there was a case some years since in the *Exchequer* before Lord Chief Baron *Skynner*, where Sago powder was found, on investigation, to be composed of starch, and though used for another purpose, still as it had been starch, in the course of the manufacture, it was held liable to the duties on starch (a). The Plaintiffs had therefore failed in proving the taking to be unlawful, and must be called.

Accordingly the Plaintiffs were nonsuited.

(a) *Rea v. Stringer, Exch.*

Wednesday,
December 19th.
At Guildhall.

MAUGHAM *qui tam* v. WALKER.

An account in the hand-writing of the person borrowing money, is no evidence for the lender, in an action for usury brought against him by a common informer.

[* 164]

DEBT on the statute against usury, for taking £50, for a loan of £1000 to *Joseph Ubank* for six months.

* *John Ubank*, the brother of *Joseph Ubank*, proved the Plaintiff's case. He acted as agent for his brother *Joseph*, and received the money advanced, for his use.

Erskine, for the Defendant, offered to produce in evidence an account in the hand-writing of *Joseph Ubank*, wherein he admitted part of this £50 to be paid, on the balance of an old account.

LORD KENYON. This is *res inter alios acta*. *Joseph Ubank* is no party to this record; he might be called as a witness and prove this account on oath, but I cannot permit any account of his, not on oath, to be read in evidence. His Lordship further said, that if the case really were as stated by the Defendant's counsel (*Joseph Ubank* being now abroad), the Court ought, in so penal a case as the present, to grant a new trial.

In a penal action the Plaintiff is at liberty to show the action commenced within a year, as well after as before the objection, that it does not appear on the record, is made.

The bill was not filed within the year, and the Plaintiff's counsel did not produce the writ as a part of their evidence. *Erskine* objected that it did not appear that the action was commenced within a year; and on *Bower*, the Plaintiff's counsel, then offering to produce the writ, he contended that after the objection was made, it was too late to give this evidence, though that indulgence was allowed in a mere civil

civil action, yet it was not proper or usual in a penal one.

But Lord Knyxon was of opinion that the Plaintiff might prove the commencement of the suit at any stage of the cause; upon which the writ was produced, and it appearing to have been sued out within * a year after the offence committed, the Plaintiff [* 165] had a verdict for the penalty of £3000 (a).

(a) This was afterwards compounded. See 5 T. Rep. 98.

SHAW and Others v. MARKHAM, Clerk.

ASSUMPSIT against the Defendant as indorser of two promissory notes, drawn by *Thomas Thomas*. Parol evidence of a letter con-

A witness of the name of *Osborne* swore that when *Thomas* dishonoured the note, he wrote three letters to the Defendant to inform him of it, and sent one to his living at *Chester*, another to his living in *Yorkshire*, and a third to the bookseller's where he usually lodged when in *London*. No notice had been given the Defendant to produce these letters, nor any copy kept. the dis- a note of ad s not un- les has been given to produce such letter.

Erskine, for the Defendant, objected to the evidence, contending that no notice having been given to produce these letters, the Plaintiff could not give parol evidence of their contents.

Bower, for the Plaintiff, answered that the letters themselves were nothing more than a notice, and that

it was an established rule that no notice need be given to produce a notice (a).

Lord KENYON said this objection could not be got over, and no evidence of the contents of the letter could be received without a notice to produce it. Call it a notice or by any other name, it was still a letter, and must be proved as any other written paper. The

[• 166] * Defendant's counsel then consented that the cause should proceed, with liberty for the Defendant to move to enter a nonsuit in case the Plaintiffs should be intitled to a verdict on the merit.

It appeared that *Thomas* having compounded with his creditors, he assigned his effects to the Plaintiffs for their benefit; and *it was agreed that Thomas should retain the fixtures and stock in trade* in consideration of which he gave these notes, and the Defendant indorsed them *as his surety*. This was done under the hope and expectation that *Thomas* was to be made a new man by this deed, but some of his creditors, to the amount of about £1000, refusing to come in under the deed, a commission of bankrupt was sued out, and the very fixtures and stock which *Thomas* was to have had, seized under that commission.

On this evidence the Plaintiffs were nonsuited.

(a) In *Hammond and Another v. Plank*, K. B. Sittings at Westminster after East. T. 36 Geo. 3. M. S. Lord Kenyon held that in an action of trover, it was not necessary to give notice to produce a written demand of the thing for which the action was brought. [The cases as to this exception to the general rule, are collected in *Peake's Law Evid.* [108] 110 and 111.]

LEE v. HUSON.

Thursday,
December 20th.

THIS was an action for a libel. After the libel had been read, the Plaintiff's counsel offered in evidence other letters and papers which also amounted to libels.

In an action for a libel, other papers which are themselves libels on the Plaintiff may be given in evidence to increase the damages.

Shepherd, for the Defendant, objected to this evidence, contending that the Plaintiff could not give in evidence any thing which was itself cause for a distinct action. If the other papers might be given in evidence in this cause, the libel for which this action is brought would also be evidence in any action which * might be brought for the other libels, and the Plaintiff would have damages several times over for the same libel.

[* 167]

Lord KENYON said, he thought these letters might be received in evidence, though they contained matter which was a ground for another action. His Lordship observed, that in actions for words it was the practice to admit evidence of other words besides those charged in the declaration, and therefore he should receive this evidence (a).

The papers were therefore read, and the Jury found a verdict for the Plaintiff, and £300 damages.

(a) *Sed vide Mead v. Daubigny, ante 125. . And Charter v. Barret, ante 22.*

WHITWELL and Others; Assignees, &c. v. DIMS-
DALE and Others.

DETINUE for the bill of sale of a ship delivered by the bankrupt to the Defendants. Amongst other pleas, the Defendants pleaded one, putting the bankruptcy in issue.

An agreement not stamped cannot be received as evidence for any purpose whatever, not even to shew that the party meant to commit a fraud by that agreement.

The Plaintiffs offered a paper writing, purporting to be an agreement made between the bankrupt and his sons, by which the former agreed to assign his effects to the latter. It was not stamped.

Erskine contended that though not evidence of an agreement, yet this paper might be read to prove that the bankrupt was in a falling state, and had an intention of defrauding his creditors, and said there
[* 168] * had been a case in which a man was convicted of forging an instrument not stamped (a).

Lord KENYON said he was of opinion that this paper writing could not be given in evidence, for any purpose whatever, either to establish or defeat it; nor did he agree with the case cited as to the forgery (b).

The Plaintiffs produced other evidence, and obtained a verdict.

(a) *Hawkeswood's case*. *Leach*, 221.

(b) The point in *Hawkeswood's* case was again discussed in the case of *Gillson*, argued in the *Exchequer Chamber*, *Michaelsmas*, 48 *Geo.* 3. and this doctrine of my Lord Kenyon cited for the purpose of affecting its authority.—

The Court, however, held that the case of *Hawkeswood* was rightly decided, and Mr. J. Lawrence mentioned that Lord Kenyon himself, in the case of *Cole v. Reculist*, 2 *Leach*, *Cro. Cas.* 811. and in other subsequent cases, approved of the decision in *Hawkeswood's case*. *Vide* 1 *Tamton*, 97.

CASES IN K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER HILARY TERM,

33 GEORGE III. 1792.

REX v. BUTCHER and Others.

Saturday,
Feb. 16th.
At Westminster.

THESE Defendants were indicted for the rescue of one *Philip Evans* from his bail, when they were going to surrender him in their discharge.

Bail above put in by the sheriff (who had discharged the Defendant without a bail bond) may surrender the Defendant.

A writ on the Lottery Act requiring bail for £500 had issued out of the Court of *Common Pleas* against *Evans*, and he was arrested thereon by a sheriff's officer of the name of *Coulson*. *Coulson* discharged the Defendant without taking any bail bond; and after the return of the writ, fearing that the sheriff might be called on, prevailed on *Purnel* and *Dennis* to become bail above. They immediately went to take *Evans* into their custody for the purpose of surrendering him. *Purnel* and *Dennis* had never seen *Evans* on the subject of their becoming bail, nor did they even know him. *Evans* on being thus suddenly

seized,

seized, opposed *Purnel* and *Dennis*, and the Defendants assisted him in making his escape.

Marryat, for the Defendants, contended that the sheriff's officer having voluntarily permitted *Evans* to escape, could not surrender him after the return of the writ, either by taking him himself, or in a circuitous way by putting in bail above, and causing them to surrender him.

LORD KENYON. The bail had a right to surrender the Defendant. They were his bail, and whether with or without his consent was immaterial; they had still the right, and they told him they were come for the purpose of surrendering him. If he resisted them it was at his peril, it would be so even in the case of death, and had either of the bail been killed, all the Defendants would have been guilty of murder. They should have submitted, and not taken the law into their own hands.

The Defendants were convicted.

Vide Berchere A et al' v. Colson. 2 Stra. 876. accord.

REX v. DOWLIN.

Tuesday,
Feb. 19th.
At Guildhall.

Though to support an indictment for perjury committed on a former trial the prosecutor must in general prove the whole of the Defendant's examination, yet when the perjury was committed in swearing to a fact not connected with the general merits of the cause, proof of the cross examination only is sufficient.

THIS was an indictment for perjury, committed on the trial of *John Kimber*, for the murder of a negro girl on board a slave ship, of which *Kimber* was commander.

Amongst

Amongst other questions asked the Defendant on his cross examination, one was "whether he had not * declared to Mr. *Jacks* that he would be revenged of *Kimber*, and, work his ruin." He swore he had made no such declaration, and upon that answer perjury was assigned. There were also assignments of perjury on the evidence given by the Defendant as to *Kimber's* treatment of the girl. [* 171]

The short-hand writer could not prove the whole of the examination in chief, as he had only taken down particular parts of it, but he proved all that was sworn on the cross examination.

LORD KENYON said, that to convict a Defendant of perjury, he should always require the whole of his evidence to be proved; for a man might explain by one part of his evidence what he had sworn in another; and therefore as to the perjury assigned on the Defendant's evidence concerning *Kimber's* behaviour to the girl, he would not proceed on it. But the question as to what had passed between the Defendant and *Jacks*, was entirely unconnected with the original examination. That question could arise on the cross examination only, and every thing which the Defendant swore on that examination being proved, the prosecutor might proceed to falsify it.

The Defendant was convicted on that assignment.
(a).

(a) *Vide Rex v. Jones, ante 38.*

*Friday,
Feb. 22d.
At Westminster.*

HATCHET and Wife v. MARSHAL.

If the Plaintiff obtain an order for the particulars of the Defendant's set-off, and, upon an application to the Defendant's attorney to deliver a particular under the order, he refers to another already delivered by his client, he is not obliged to deliver a fresh particular.

THIS was an action of covenant for non-payment of rent, &c. As to the breach for non-payment of rent, the Defendant pleaded a set-off.

The plaintiffs had taken out a summons for the particulars of the Defendant's set-off, and obtained a Judge's order thereon. When the Plaintiffs' attorney applied to the Defendant's attorney to comply with the order, he said that the Defendant had delivered the Plaintiffs an account in writing before the commencement of the action, and that he could not give any further particulars than were contained in that account.

The Plaintiffs' counsel objected that the Defendant not having delivered any particular pursuant to the order, could not go into his set-off.

LORD KENYON. This is a virtual compliance with the order. If I were to hold that the Defendant was not intitled to go into his set-off, I should be spreading a net of forin to catch the parties. The intent of the order was that the Plaintiff should not be surprised, and when the Defendant refers to another account, that intent is fully answered. I will not permit the Defendant to go out of that account.

The Defendant had also pleaded an eviction, but that plea not being proved, nor the set-off covering the Plaintiffs' demand, they had a verdict for the balance.

WRIGHT and Others v. RILEY.

ASSUMPTIVE against the Defendant, as indorser of a bill of exchange, dated 9th September, 1791.

The bill when produced in evidence appeared to be properly stamped; but the Defendant proved that it was not stamped when drawn, nor for some time afterwards.

It is no defence to an action at the suit of the indorser of a promissory note or bill of exchange that the bill was not stamped at the time of making it, if it has a proper stamp when produced at the trial.

Erskine, for the Defendant, contended that the bill was absolutely void; and could not be made good by the stamp impressed upon it after it was drawn, for by the act of the 31 Geo. 3. c. 25. § 19. it is enacted that the paper on which any bill is written shall be stamped before the bill is drawn; and that it shall not be lawful for the Commissioners of the Stamp Duties to stamp any paper on which such bill shall be written after the same is written thereon.

Lord KENYON said; that though the Commissioners might have exceeded their duty in stamping the bill against the positive directions of the act of parliament, still that being stamped, he thought it was become a valid instrument, and a Judge at *Nisi Prius* could not enquire how and at what time it was stamped. Much inconvenience might arise, and a great check be put upon paper credit, if the objection was to be allowed, for how was it possible for a man taking a bill in the ordinary course of business to know whether it had been stamped previous to the making of it or not.

The Plaintiffs had a verdict (a).

(a) *Vide stat. 34 G. 3. c. 32.*

Saturday,
February 23d.

LLOYD v. HARRIS.

In an action for a malicious arrest, the Plaintiff must prove the sheriff's warrant on the writ against him.

THIS was an action on the case for maliciously holding the Plaintiff to bail for £15 when nothing was due. The Plaintiff proved the affidavit of debt, the writ, and the arrest by the officer, but could not prove the warrant by virtue of which he was arrested.

Mingay, for the Defendant, objected that this was a necessary link in the chain of evidence.

Gibbs, for the Plaintiff, contended that the sheriff's return of *cepi corpus* appearing on the back of the writ, and it being entered in the judgment of *non pros* that the Plaintiff was arrested and held to bail, sufficiently proved the arrest to have been made under the writ.

Lord KENYON said, that as against the present Defendant, this was no evidence of the arrest having been under the writ. The return of *cepi corpus* was made by the sheriff, without any privity of the then Plaintiff, and the judgment of *non pros* was entered by the Defendant in that cause.

The Plaintiff was nonsuited (a).

(a) *Vide Blatch v. Archer*, *Comp* 68.

GOODACRE v. BREAME.

[* 175]

A man who is proved to be a partner with the Defendant cannot be examined as a witness to prove that he only is liable.

ASSUMPSIT for goods sold and delivered.

The Plaintiff's witness swore that the Defendant and * his brother *William Breame* were partners in trade, and that these goods were sold to them in partnership.

The

The Defendant called *William Breame* to prove that the goods were sold to him, and that the Defendant had no concern in the purchase of them, otherwise than as his servant.

LORD KENYON. He is not a witness to prove this; for he comes to defeat the action of the Plaintiff, against a man who is proved to be his partner, and by discharging the present Defendant, he benefits himself, as he will be liable to pay a share of the costs to be recovered by the Plaintiff in this cause.

Verdict for the Plaintiff (a).

(a) In this case the witness might have been rendered competent by a release. *Vide Young v. Bairner*, 1 *Exp. Cas.* 103. And in a still later case the Court determined, that when it appears the witness is interested both ways, they could not nicely weigh on which side his interest preponderated; and therefore an indorsee of a promissory note to whom the drawer had given money to take it up, was held to be a competent witness for the Defendant to prove it paid, being either liable to the Plaintiff on the note, or to the Defendant for money had and received. His being also liable in the latter case to the costs of the action was considered as making no difference. *Birt v. Kershaw*, 2 *East.* 458.

MACDONALD v. STEELE, Esq. and Another.

*Monday,
Feb. 25th.*

THIS was an action on the case against the Defendants as paymasters general of the forces, for not giving their draft on the bank for a sum of money due to the Plaintiff for his half pay (a).

The king may at any time stop the half-pay of an officer in the army by signifying his pleasure that it shall be no longer paid.

(a) *Vide Lidderdale v. Duke of Montrose, and Another.* 4 *T. Rep.* 248.

It

It appeared that the Plaintiff still continued on the list of half pay officers, but the Defendants proved that the Plaintiff being indebted to the agents of the regiment in a large sum of money, on account of money over-drawn by him, they entered a *caveat* to prevent his receiving his half pay; and in consequence of that

[* 176] * *caveat* Sir George Yonge, the secretary at war, sent a letter to the pay office signifying his Majesty's pleasure that the pay should not be continued to the Defendant longer than *Christmas* 1789.

Erskine, for the Plaintiff, said that the pay appeared to have been stopped before the King's pleasure was signified. The pay office could not stop the payment on account of the debt due to the agent, though if the agent was indebted to the crown an extent in aid might have secured this money. He admitted that the crown had the absolute controul of the army, but this sum of money having been appropriated by *Parliament* for the express purpose of paying the forces, the King could not, merely by signifying his pleasure, deprive the Plaintiff of the money so appropriated.

Lord KENYON said, he was clearly of opinion that the pay office could not stop for the debt due to the agent. If the public had a demand on the Plaintiff that might be set off against the present action. But his Majesty's pleasure supersedes all enquiry, as he has the absolute direction and command of the army. It is true, *Parliament* has provided a sum of money, but that is to be distributed as the King chuses. The money is under his controul till such time as it is paid out. The King cannot take it for his own use, but he may prevent it from being paid to a person who is not entitled to receive it. The *caveat* of the agent

was

was merely waste paper till adopted by the King, when he adopted it, it became his own act; and it is for the honour of government to see that money due to an officer is applied to the payment of his debts.

The Plaintiff was nonsuited.

* *Note.* Mr *Bearcroft*, in opening the Defendant's [* 177] case, said that the money was not stopped on account of a debt due to the agents, but for a debt due to the Crown for money remaining in the Plaintiff's hands as pay-master of the 84th regiment; but this was not proved.

GOODE v. JONES.

ASSUMPSIT for money had and received.

The Plaintiff, a grazier in the country, had sent three oxen by *Cooke* his drover, to *Smithfield* market, to be sold by a salesman there. *Holbeach* the salesman employed the Defendant as his book-keeper, and he was also employed by several other salesmen. On the evidence it appeared that it was the business of the book-keeper to receive the money from the purchaser, and keep an account of the beasts sold, distinguishing what each beast was sold for, and to whom it belonged. When that is done the salesman sends an order to the book-keeper, desiring him to pay the money to the drover.

In the present case, *Holbeach* the salesman being indebted to the Defendant, he refused to pay the money received

*Wednesday,
February 27th.
At Guildhall.*

A book-keeper
in *Smithfield*

...g money for
beasts sold there,
is liable to pay
such money to
the owner of the
beasts, and can-
not apply it in
payment of a
debt due to him
from the sales-
man.

received for the Plaintiff's cattle to him, insisting that he had a right to retain the money received by him, on that account, to satisfy the debt due to him from *Holbeach*. *Holbeach* became insolvent, and the Plaintiff brought the present action.

[• 178] *Erskine*, for the Defendant, contended that there was no privity between the Plaintiff and the Defendant. * ant. The Defendant kept his account with *Holbeach* only, and the Plaintiff could only call on him for the money. This is much like the case of a banker. If a sum of money is paid into his hands for the use of a factor, it will never be contended that the principal may maintain an action against him. He offered to call witnesses to prove that by the universal custom of the market the book-keeper was considered as the debtor of the salesman, and not of the grazier, with whom he had no connection.

Lord KENYON said, he never was clearer in any case than the present. By the common law of the land the Plaintiff is entitled to receive this money from the Defendant, and no custom whatever can deprive him of it. There is not the least similitude between the case of a banker and the present Defendant. No privity whatever exists between the banker of a factor, and the principal whom he never heard of, but this Defendant knew that he was receiving this money for the use of the Plaintiff: he entered his name in his book, and distinguished how much was due to him.

Verdict for the Plaintiff.

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER TRINITY (a) TERM.

33 GEORGE III. 1793.

COLE and Another v. BLAKE.

*Monday,
June 24th.
At Westminster*

THIS action was brought to recover a sum of £15. 2s. which the Plaintiffs claimed to be due to them for work and labour done as surveyors. The Defendant pleaded a tender of ten guineas.

It on a tender being made, the creditor insists on receiving a thing in full or none, he can not afterwards object to the formality of the tender on account of the debt having required a receipt.

It clearly appeared that the Plaintiffs were not entitled to receive more than ten guineas, but the witness who proved the tender, on his cross examination said, that he believed he had asked for a receipt in full, and added that he should not have paid the money unless the Plaintiffs would have given such receipt. But he said further that the Plaintiffs insisted on payment of £15. 2s for this work, and did not pretend to have any other demand on the Defendant, or object to the formality of the tender on account of the receipt being demanded.

(a) Every case which came before the Court at the *Sittings after Easter Term*, 33 Geo. 3. has been already reported by Mr. *Espinasse*.

O

Lord

Lord KENYON was clearly of opinion that the tender was proved. His Lordship said that it had been determined, that a party tendering money could not in general demand a receipt for the money. There had been one case indeed in the *Exchequer*, in which Sir *Watkin Williams* was a party, where it was determined that the King's Receiver was obliged to give a receipt (a), but that was an exception to the general rule. In this case, however, the dispute between the Plaintiffs and the witness was not whether a receipt should be given or not, but whether the sum tendered was sufficient; and, as it clearly appeared on the Plaintiffs' own evidence that the sum tendered was sufficient to satisfy the whole demand, he was of opinion the Defendant was entitled to a verdict on the plea of tender.

Verdict for the Defendant (b).

(a) *Vide Bonbury*, 318.

(b) *Vide Smith v. Black. ante*
88.

LOCKYER v. JONES, K. B. *Guildhall*, Sittings after Hilary Term,
36 Geo. 3.

Assumpsit for money lent, to which the Defendant pleaded a tender of £10.

The Plaintiff endeavoured to prove a debt of £40, but was not able to prove more than £10; and the Defendant in support of his plea, proved, that in *July*, 1795, the Plaintiff and he having an altercation about the money due from him to the Plaintiff, he tendered a £10 *Liverpool Bank* Bill of Exchange to the Plaintiff,

which he refused to accept, insisting on being paid the whole of his debt.

The Plaintiff's counsel contended, that this was no legal tender and attempted to distinguish this from the case of a Bank Note, which, in the ordinary transactions of mankind, was considered as cash.

But Lord Kenyon said, that though he was not inclined to give a greater credit to paper of this kind than it already possessed, yet he was of opinion, that the tender in the present case was a good one; that even a Bank Note was no tender if objected to by the creditor; but the Plaintiff in this case was precluded from now objecting

objecting to the legality of the tender by his conduct at the time it was made; he did not then object to it on account of the form in which it was made, but because it was not sufficient to cover his demand. Had he then objected to it on account of its informality, the Defendant might have taken the money from his pocket and tendered that.

Verdict for the Defendant.

Mingay and Peake for Plaintiff.
Erskine for Defendant.

This point arose again in the case of *Mills* against *Safford*, *Each. East. T. 48 Geo. 3.* when the Court held, that a tender of a *Bristol Bank Bill* was not a good tender, though no objection was made to it on that account.

JACKSON *v.* ATTRILL.

ASSUMPSIT for the use and occupation of part of a house, and for goods sold and delivered.

The statute of the 24 Geo. 2. relating to liquors under the value of 20s. does not extend to liquor sold for the purpose of being sold again.

[* 181]

The Plaintiff was a liquor merchant, and the Defendant took one side of a house belonging to him, the other side being occupied by one *Eaton*, who sold liquors on the account of the Plaintiff. The Defendant kept an eating-house, and the liquors consumed by the customers there, were had from *Eaton*, as they were wanted. Many of the items, in the bill, for liquors were under 20s. By the statute 24 Geo. 2. c. 40. s. 12. it is enacted, "that no person or persons whatsoever shall be intitled unto or maintain any cause, action or suit for, or recover either in law or equity any sum or sums of money, debt or demands whatsoever for or on account of any spirituous liquors, unless such debt shall have been, and *bona fide*, contracted at one time to the amount of 20s. or upwards: nor shall any particular article or item in any account or demand for distilled spirituous

“ liquors be allowed or maintained, where the liquors
 “ delivered at one time and mentioned in such article
 “ or item shall not amount to the full value of 20s. at
 “ the least, and that without fraud or covin.”

Garrow, for the Defendant, contended that the Plaintiff could not recover in the present action for such liquors as were sold in quantities of less value than 20s. They were sold directly in the teeth of this act of parliament, which is positive and without any qualification or exception.

Lord KENYON thought this case did not fall within the mischiefs intended to be remedied by this act of parliament, the intent of which was to prohibit the sale of such small quantities to the *consumer*. This was done for the purpose of preventing the pernicious effects of dram drinking, which had been found extremely injurious to the lower orders of society. In the present case the liquors were not sold to the De-
 [* 182] * fendant for his own consumption, but for the use of the guests resorting to his house in the way of his trade, and therefore, in his Lordship's opinion, not within the act of parliament. His Lordship said that he would take a note of the objection, and the Defendant might move the Court if he thought proper.

Verdict for the Plaintiff (a).

(a) I believe the Defendant did not move the Court.

GREEN v. HEWETT.

Tuesday,
July 2d.
At Westminster.

ASSUMPSIT for money had and received.

The action was brought for the purpose of trying the Plaintiff's right to the office of Usher and Cryer of the Court of King's Bench, which he claimed as the grantee of the crown. The Defendant admitted the Plaintiff's right, but claimed the office of Under Usher, as an independent and distinct office from that of the Chief Usher and Cryer.

The under
Ushers and
Cryers of the
Court of King's
Bench are dis-
tinct officers
from the Chief
Usher and
Cryer, and not
dependant on
him. *Cum se-
mble.*

Bearcroft, in his opening for the Plaintiff, said it was clearly competent to the principal to execute by deputy, and that it was also clear that if a principal appoints a deputy, the appointment falls on the death of the principal. That the person who appointed the Defendant being dead, his office was at an end, and the Plaintiff had a right to appoint any other deputy. It was convenient it should be so, for the principal would be answerable for the deputy civilly, even should he be guilty of extortion. He said that a *Deputy Teller of the Exchequer had contended that his office was independent of that of his principal, but he was unsuccessful. [• 183]

The Plaintiff then proved a *patent* dated 27 Car. 2. another in 3d of W. & M. and a third on the 29th of April, 25 Geo. 3. whereby "the reversion of the office "of Usher and Cryer of the Court of King's Bench," after the death of *John Collier*, was granted to *John Cranston*, and the next reversion, subject to the lives of the said *John Cranston* and *John Collier*, to *Milward Rowe*. *John Cranston* being in possession of

the office, and *Milward Rowe* being intitled to the reversion, they by deed poll appointed the Defendant “ one of the Deputy Ushers of the Court, to hold “ and exercise the office of a Deputy Usher of the “ said Court in all things which to that office only be- “ long, *so long as he should live, and to take all “ wages, fees and regards which belong to the office “ of a Deputy Usher*, and have been anciently due “ and accustomed to be paid for the exercise of the “ said office,” and the Defendant at the same time signed a paper, whereby after receiving the appointment he “ acknowledged and agreed that such appoint- “ ment was not understood to contain any warranty “ or assurance from the said *John Cranston* and *Mil- “ ward Rowe*, or either of them, for his holding the “ said place or office longer than the said *John Cran- “ ston* and *Milward Rowe*, or the survivor of them, “ should happen to live, in case any future Cryer or “ Usher should be appointed by his Majesty or any “ of his successors who should have power to remove “ him from his said office.”

[184] * The Plaintiff next proved a grant of the reversion to him on the 26th of *February*, 28 *Geo. 3.* which grant, like all the others, granted the reversion of the office to him “ to have, occupy and enjoy, and exer- “ cise the said office unto him the said *William Green*, “ by himself *or his sufficient deputy or deputies*, with “ all and singular wages, fees and regards, anciently “ due and accustomed upon the exercise of the said “ office.”

The inquiry taken in the year 1730 as to the fees due to the officers is conclusive evidence.

LORD KENYON asked what appeared from the inquiry taken in the year 1730 as to the fees claimed by these officers? When the *Custos Rotulorum* died, which made room for Sir *David Lindsay*, it occurred

to Lord *Mansfield* that the office of Deputy failed, and he doubted whether Mr. *Filmer* was not out, but a learned gentleman at the bar stating that in that inquisition the office was treated as a distinct office from that of the principal, he was suffered to continue in his office.

In a late case on the petty bag fees that inquisition was considered as conclusive evidence by all the gentlemen of the bar, and so treated by me.

The Plaintiff proceeded in his evidence, and proved the death of *Milward Rowe* on February 7, 1793, upon whose death the Plaintiff appointed four deputies, who came into court with gowns on for the purpose of asserting their right to, and doing the duties of the office. He also proved that the Defendant had received money for the justification of bail, and on the trials of causes.

Erskine, for the Defendant, said that he meant to contend that the offices of Chief Cryer and Under Cryer, were distinct and different offices, and that the * latter were not deputies to the former, but entirely independent of him. That it was so considered in the year 1730, when the inquisition was taken, for the fees due to each were contained in separate lists. (a) By that inquisition it appeared, that all fees taken in court belonged wholly to the Under-ushers and Cryers, and that the Chief Usher and Cryer was entitled only to 4*d.* for every judgment, and 4*d.* on every special or common bail, which amounted to £400 *per ann.*; and as no such fees had been taken by the Defendant, he contended the Plaintiff must be called.

(a) See the Lists presented to the House of Commons, p. 27. No. 12, and p. 32.

Lord KENYON. I will not say how far it is prudent in the Plaintiff to bring his right to a sinecure place thus publicly into discussion. The old way of trying questions of this kind was by an assize, but that mode is now laid aside, and this more compendious form of action adopted in its stead. This is a good form of action to try the Plaintiff's title to the office, but it behoves the Plaintiff to shew that he is entitled to the fees which the Defendant has received. He must shew what the limits of his demand are. But what proof has been given in this case, that any fees belonging to the Usher of the Court of King's Bench have been received by the present Defendant? As far as the inquisition goes, his fees are described, and they contain nothing that will include the fees now claimed. In many cases, the office of the deputy depends on the office of his principal, and ceases with it, but not always. The whole argument in this case rests on assumption. It has been assumed, though not proved, that the Under Ushers are mere Deputies of the Chief Usher. If the word Deputy is used

[* 186] * in the patent instead of Under Usher, it will not affect the case if it appears from the nature of the office that he is an independent officer. Many officers have power to grant more stable offices than their own. The Chancellor appoints the Masters in Chancery and Cursitors; yet if the *King* was to exercise his right of displacing the present Lord Chancellor, that would not affect the Masters in Chancery or Cursitors appointed by him. The case of the Teller of the Exchequer does not apply; it was clearly proved in that case, that he was a mere servant. There is no ground for saying that this Defendant has received one farthing belonging to the Plaintiff; even if the fees were im-

properly

properly received by the Defendant, it does not follow that they belong to the Plaintiff; to support this action for them, he should shew expressly that he is entitled to them. I say nothing of the Act of Parliament, but it is well worth Mr. *Green's* while to consider whether these are not officers independent of him. The acknowledgement signed by the Defendant does not go in derogation of his life estate, if he has such an interest, it was only meant to avoid a warranty.

Nonsuit.

HAWKINS and Others v. RUTT and Another.

*Wednesday,
July 3d.
At Guildhall.*

ASSUMPSIT for goods sold and delivered.

The Plaintiffs had desired the Defendants to remit them the debt, for which this action was brought, * by the post; and the Defendants had accordingly inclosed bills of exchange of sufficient value to satisfy it, in a letter. This letter was delivered to the Bell-man in the Street, but never came to the hands of the Plaintiffs, nor could they trace any of the bills.

A person remitting money by the post should deliver the letter at the general post-office, or a receiving house appointed by that office, and not to a bell-man in the street.

[* 187]

The Defendants' counsel contended that this was a good payment. The bills they said were remitted in the mode pointed out by the Plaintiffs themselves and at their risk.

LORD KENYON. The Defendants have not, in this case, used due caution. They ought to have delivered the letter at the general Post-office in *Lombard-street*, or to one of the houses authorised by that office to receive letters with money, and not to a Bell-man in the

the Street. Delivering letters with money, or bills in them, to a man of that description, is a temptation to him to be dishonest. Had the Defendants delivered the letter at a proper office, I should have thought that this was a very good remittance, but I do not think the Plaintiffs ought to be charged with money remitted as this was.

Verdict for the Plaintiffs.

STEVENS and Others v. THACKER.

If the holder of a bill of exchange agree not to sue the acceptor upon his making affidavit that the acceptance is a forgery, and such affidavit be accordingly made and sworn,

THIS was an action by the indorsee of a bill of exchange against the acceptor.

* When the bill was produced to the Defendant for payment, he said that the acceptance was a forgery, and offered to make an affidavit that he had never accepted the bill. The Plaintiffs at first agreed not to sue the Defendant on the bill if he would make the affidavit offered by him; but being afterwards convinced that the Defendant had accepted the bill, they refused to receive the affidavit, and brought this action. The affidavit had been drawn and ingrossed, but not sworn.

ORIN.
[* 185]

Erskine, for the Defendant, contended, that the Plaintiffs having agreed to accept the Defendant's affidavit as evidence that he was not the acceptor of the bill, could not afterwards recede from the agreement; and mentioned a case wherein Lord *Mansfield* had decided, that the Defendant might discharge himself by such an affidavit.

Lord

Lord KENYON. Had the Defendant sworn the affidavit, I should have held that he had discharged himself from the present action, though such affidavit had been false, for the Plaintiffs, who had agreed to accept that affidavit as evidence of the fact, should not after having induced the Defendant to commit the crime of perjury, maintain an action on the bill. But as in the present case, the Defendant had not sworn the affidavit, he still remains liable to the Plaintiffs' action unless he can prove the acceptance a forgery.

The Defendant calling no witnesses, the Plaintiffs had a verdict. (a).

(a) *Vide Brettan v. Prettiman*, the Master had no authority to administer the oath. See also 3d Lev. 241. where it was determined that the parties who substituted a particular form of trial should be bound by the decision.

* DICK v. LUMSDEN.

TROVER for a quantity of beef and pork, which had been delivered to the Defendant at *Newry* in *Ireland*, to be conveyed in a ship, of which he was master, to *London*.

The provisions in question were sent by *Thompson & Co.* from *Newry*, to *Eustace* and *Holland* their factors in *London*, for the purpose of being sold; and on the

[* 189]

Fruhan,
July 5th.
At Guildhall.

If *A.* has an equitable title to goods on board a ship, and *B.* knowing of such title gets an indorsement of the bill of lading he cannot recover such goods in an action of trover, but the captain will be justified in delivering the goods to *A.*

the 10th of *January* 1793, *Thompson & Co.* wrote to *Eustace* and *Holland* to make an insurance, and said, that they would send the bill of lading. They accordingly sent the bill of lading on the 14th of that month, *not regularly indorsed*, but with the name of *Eustace* and *Holland* written on the back. The insurance was made on the 15th, and *Eustace* and *Holland* then wrote to *Thompson & Co.* for an indorsement of the bill of lading. By a letter dated the 2d of *February*, *Thompson & Co.* answered, that *if the bill of lading was not indorsed it was a mistake, and that they would send an indorsement*; upon which *Eustace* and *Holland* sold the provisions to *Boehm* and *Taylor*.

Thompson & Co. had drawn bills on *Eustace* and *Holland*, and they not being able to pay them when they became due, the Plaintiff paid them for the honour of *Thompson & Co.* the drawers, of whom he was in other respects a creditor; and *having knowledge of all the above-mentioned transactions*, he wrote to *Thompson & Co.* for an indorsement of the bill of lading, which they sent him. He then demanded the provisions of the * Defendant, but *Boehm* and *Taylor* having indemnified him, he delivered the provisions to them.

[• 190]

Erskine, for the Plaintiff, contended, that the Defendant was bound to deliver the goods to the indorsee of the bill of lading, and could not take upon himself to judge of the Plaintiff's title to them. He compared the case to one which he said had been determined by Mr Justice *Gould* on the circuit; who held, that a carrier having a mill-stone directed to one man, could not take upon himself to deliver it to another person, who he thought had a better title.

Boehm

Boehm and Taylor had no legal title to these provisions, whatever right they might have in equity.

LORD KENYON. The Plaintiff knowing all the circumstances of this case, could not by any subsequent act of his own, take the goods in question out of the possession of *Boehm and Taylor*. Though between persons ignorant of the transactions, an indorsement is the only transfer, yet where parties know the whole circumstances, a letter of this kind is a sufficient transfer of the property. The bills that have been mentioned, were not drawn precisely for these goods, but on the general account. Here the factor transferred the property, and having a competent authority so to do, it was not essentially necessary that he should have the possession of the goods or an indorsement of the bill of lading. This is much like the case of a register county, as to the purchase of real property. If a man doth not register his purchase deeds, and another person buys the estate *without notice* of the previous purchase, it will * not affect him; but if he knows of such purchase he shall not avail himself of the neglect to register. (a).

[* 191]

The Plaintiff was nonsuited (b).

(a) *Vide Hine v. Dodd*, 2 Atk. 275. 4 Burr. 2050.

(b) *Vide Caldwell and Others v. Ball*, 1 Term Rep. 205. *Hibbert and Carter*, *ibid.* 745.

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER MICHAELMAS TERM,

34 GEORGE III. 1793.

*Wednesday,
Dec. 4th.
At Westminster.*

HEARN and Another v. TOMLIN.

Where a man agrees to purchase premises on an assurance that the person of whom he purchases has a long term in them, and on the faith of such assurance a considerable expence enters into the possession of them, he shall not, on his refusing to complete his purchase (on account of the seller having a shorter term) be charged in an action for use and occupation.

THIS was an action for the use and occupation of a wharf.

The Plaintiffs had agreed to sell the wharf to the Defendant, and stated that the lease had 13 years to run. Under this contract the Defendant entered into possession of the wharf; but it being afterwards discovered that the Plaintiffs had an interest in the premises for three years only, the Defendant refused to complete his purchase. The first witness proved, that so far from being a beneficial occupation to the Defendant, he had been put to great expence in removing timber to the wharf which was intended to continue there some years.

Lord KENYON. To maintain an action for use and occupation, it must appear that the occupation has been

been beneficial to the Defendant. This occupation was injurious to the Defendant, who had he been told that the Plaintiffs had only a term of three years in the premises, would never have entered upon them, and the Plaintiffs shall not be permitted to make this the ground of an action.

His Lordship therefore directed a nonsuit.

UPSDELL v. STEWART.

ASSUMPSIT for work and labour as a surveyor. The Plaintiff demanded £34. being £5 *per cent.* on all money charged by, and allowed to the different tradesmen. The Defendant had paid one half of the sum demanded into court contending that $2\frac{1}{2}$ *per cent.* was a sufficient compensation for the business the Plaintiff had done. He had done nothing more than measure the work, and settle the bills, not being at all employed in building the house.

A surveyor is to be paid according to his labour and not according to the amount of the bill, as looks over and settles. (a).

Garrow, for the Plaintiff, offered to call witnesses to prove that the uniform practice of surveyors was to charge £5 *per cent.* on all money allowed to the workmen; and instanced the case of surgeons and others, whose fees were settled by the evidence of professional men, as to the usual charge on such occasions.

Lord KENYON. The Plaintiff is entitled to a rea-

(a) Same rule applied to the per centage of $7\frac{1}{2}$ *per cent.* charged by auctioneers, *Malthy v. Christie*, 1 *Esp.* 940.

sonable compensation for his labour, but he is not to estimate that by the money laid out by the Defendant in finishing his building.

[* 194] * I am bound to give my opinion on the matter of law, the Jury will answer as to the fact. I am enabled to state from the record what is the true question between the parties. The Plaintiff states his demand to be "as much as he *reasonably* deserves to have for his "work and labour." Does he *reasonably* deserve to have this exorbitant demand? As to the custom offered to be proved, the course of robbery on *Bag-shot Heath* might as well be proved in a court of justice. It ought not, nor cannot be supported.

On his Lordship expressing himself thus strongly. *Garrow* consented to a nonsuit.

Friday.
Dec. 6th.

ASHLEY v. HARRISON.

The proprietor of a public amusement cannot maintain an action against a libeller of his performers, because where he has been deterred from appearing on the stage.

THIS declaration stated, that the Plaintiff during the time of *Lent* 1793, caused to be performed every *Wednesday* and *Friday* night, by divers singers and musicians at a certain place of public amusement, called *Covent Garden Theatre*, certain musical performances for the entertainment of the public for certain rewards paid to him for admission into the said place of public amusement by those persons who were desirous of hearing the said musical performances; by means whereof he derived great gains, &c. yet the Defendant knowing the premisses, but contriving to lessen the profits, &c. and to terrify, deter,

deter, &c. a certain public singer called *Gertrude Elizabeth Mara*; who had been before that time retained by the Plaintiff to sing publicly for him at the said place, &c. from so singing; wrote and published a certain false and malicious paper writing of and concerning the said *G. E. Mara*, and of and concerning her conduct, as such public singer as aforesaid, containing therein, &c. The libel was then set out, and the declaration concluded, that by reason thereof the said *G. E. M.* could not sing without great danger of being assaulted, ill-treated, and abused, and was terrified, deterred, prevented, and hindered from so singing; and that the profits of the amusement were thereby rendered much less than they otherwise would have been

[195]

On the opening of the cause, Lord *Kenyon* expressed his disapprobation of the action, but on *Erskine*, for the Plaintiff, suggesting, that the objection was on the record, his Lordship permitted the cause to proceed.

The declaration was proved, and Madame *Mara* said, that "she did not chuse to expose herself to contempt again, and therefore refused to sing."

When the Defendant's counsel were proceeding to their defence, they were stopped by Lord *Kenyon*, who said: This action is unprecedented, and I think cannot be supported on principle. The injury is much too remote to be the foundation of an action. If this action is to be maintained, I know not to what extent the rule may be carried. For aught I can see to the contrary, it may equally be supported against every man who circulates the glass too freely, and intoxicates an actor, by which he is rendered incapable of per-

[* 196]

forming his part on the stage. If any injury has happened, it was occasioned entirely by the *vain fears* or *caprice* of the actress. *Madam Mara* says, she did not chuse to expose herself to contempt again. The action then is to depend entirely on the nerves of the actress, if she chuses to appear on the stage again no action can be maintained ; if she does not, her refusal is to be followed with an action. In actions for defamation whereby a woman loses her marriage, it is not sufficient to prove that she was a virtuous woman, and one who might reasonably hope to have settled well in life ; but a marriage already agreed upon must be shewn to have been lost. (a)

The Plaintiff was nonsuited. (b)

(a) *Vide Cro. Eliz.* 787. *Cro. Jac.* 422. *Lutw.* 1296. *Latch.* 218.

(b) *Vide Tarlton and Others v. McGawley*, post 205. *Cro. Jac.* 567. *Roll. Rep.* 162. *S. C.* 1 *Roll. Abridg.* 107, 108. 1 *Bac. Abr.* 53.

Saberton,
Dec. 7th.

DOE dem WILLIAMS and Another v. PASQUALL.

A refusal to pay
rent to devisee
in a will which
is contested is
a disavowal of the
title as devisee to
such devisee to
maintain ejectment with-
out giving a pre-
vious notice to
quit.

THE Defendant came into possession of the premises for which this ejectment was brought, as tenant to *Daniel Morgan* who devised the same to the lessors of the Plaintiff upon certain trusts mentioned in his will. The will of *Morgan* had been contested in the Ecclesiastical Court, and it was proved that the Defendant had frequently said he was ready to pay his rent to any person who was entitled to receive it ; but doubting whether the will was duly made, he had refused

sed

sed to pay it to the lessors of the Plaintiff. He had paid part of this rent to a man of the name of *Parke* who had collected rents for *Morgan* in his life-time.

* The Plaintiffs' counsel contended that this refusal [* 197] of the Defendant was such a disavowal of the lessors of the Plaintiffs' title, as entitled them to consider the Defendant as a trespasser, and eject him without any notice to quit.

LORD KENYON said, this was not such a case as rendered a notice unnecessary. It had been held that if a tenant put his landlord at defiance, he might consider him either as his tenant or a trespasser, and in the latter case need not give him a notice to quit before he brought his ejectment: but that was not the case here, for the Defendant professed himself ready to pay to any person who was entitled to receive; nay, it is proved that he actually paid a considerable part of his rent to *Parke*, who was the collector of *Morgan* in his life-time, and the only person he could trust.

The Plaintiff was nonsuited. (a)

(a) *Vide Bull. Ni. Pri.* 96.

PULLER and Others, Assignees, &c. of FORBES
and GREGORY Bankrupts v. ROE and Others.

Monday,
Dec. 6th.
At Guildhall.

ASSUMPSIT on a promissory note for £9800, dated *March 8, 1793*, payable to *Charles Caldwell, Esq. and Company*, or order, and by them indorsed to the bankrupts under the firm of "Messrs. *B. Burton, Forbes and Gregory.*"

A. B. C. and D. are in partnership together, and *C. and D.* also trade on their separate account. The partnership of *A. & Co.* becomes indebted by *C. and D.* as

to *C. and D.* and to satisfy such debt they indorse a note given to them. In an action indorsers of that note the debtor may set-off any demand he has against *A. & Co.*

The Defendants pleaded the general issue, and gave notice of set-off.

Bartholomew tBurton, and the bankrupt *Forbes*, carried on the business of general merchants in *London*, from the year 1762 to 1769, and on the 31st of *January* 1769, the bankrupt *Gregory* was admitted a partner in the house. *Burton* died on the 27th of *April*, 1770, but the business was still carried on under the old firm of "*Burton, Forbes, and Gregory*."

On the 21st of *May*, 1774, *Forbes* and *Gregory* became partners with *Charles Caldwell* and *Thomas Smith*, in a banking-house at *Liverpool*, under the firm of *Charles Caldwell & Co.* and that partnership continued to the time of their respective bankruptcies, which happened in the month of *March*, 1793, viz. that of *Forbes* and *Gregory* on the 16th, and that of *Caldwell & Co.* on the 18th of that month.

The two houses of *Forbes* and *Gregory* and *Caldwell & Co.* were distinct and separate houses; *Caldwell* and *Smith* having no concern in the business carried on by *Forbes* and *Gregory* in *London*, though the latter were partners in, and equally concerned with *Caldwell* and *Smith* in the banking business carried on at *Liverpool*, under the firm of "*Charles Caldwell & Co.*"

Caldwell and *Smith* were also in partnership with the Defendants under the firm of *Roe & Co.*; which company kept a banking account with the house of *Caldwell & Co.* at *Liverpool*; and that house being in advance for the Defendants, they, on the 8th of *March*, 1793, made and signed the note on which the action was brought; and the house of *Caldwell & Co.*

at *Liverpool*, being indebted to *Forbes* and *Gregory* to a large amount, indorsed the note to them.

* This note was given for the balance then supposed [* 199] to be due from the Defendants to *Caldwell & Co.* but it was afterwards discovered that a sum of £3859. 1s. with which the Defendants were debited for sundry bills supposed to have been drawn by *Major* (*Caldwell & Co.*'s agent at *Truro*) was improperly charged; such bills never having been in fact drawn.

Bower, for the Defendants, contended that *Forbes* and *Gregory* being partners in the house of *Caldwell & Co.* must take this note, charged with every incumbrance which it would be liable to in the hands of *Caldwell & Co.* and therefore that the Defendants had a right to deduct the above-mentioned sum of £3859 1s. and to set-off not only the sum of £680. 8s. 10d. due to them from *Forbes* and *Gregory* as the acceptors of several bills drawn by *Caldwell & Co.* on them; but also the sum of £260. 18s. 3d. due to the Defendants from *Caldwell & Co.* on several bills drawn by *Caldwell & Co.* on *Forbes* and *Gregory*, which were not accepted by them. Some of these bills had been drawn by *Caldwell & Co.* for checks drawn upon them by the Defendants as their Bankers; and the bills not being paid when they became due, in consequence of the failure of *Caldwell & Co.* and *Forbes* and *Gregory*, the Defendants were obliged to take them up, and had paid to the several holders of them the full value thereof. The others were either payable to the Defendants, or indorsed to them by the respective payees.

Erskine, for the Plaintiffs, contended that *Forbes* and *Gregory* being a distinct and separate house, and creditors of *Caldwell & Co.* to an amount much beyond

[* 200] that for which this note was given, were not liable to pay the before mentioned sum of £3859. 1s. or the bills which they had *not accepted*. For payment of those * sums the Defendants must look to the estate of *Caldwell & Co.* who were their debtors.

LORD KENYON. This note was given to *Caldwell & Co.* as a banking-house, and constitutes an article in the accounts between the Defendants and them. They cannot *as between themselves* raise a distinct account, though they might indorse to a third person. The affairs of the Company are in presumption of law known to all the partners, and all are equally liable. The Defendants send this bill to *Caldwell & Co.* to cancel part of the debt due to them: Can they, by an act between themselves, divert this money to another purpose, and leave the whole of the Defendants' debt outstanding?

The Plaintiffs, therefore, had a verdict for the balance due to them, after deducting the several before-mentioned sums of money, and also the sum of £1024 which it was admitted that *Forbes* and *Gregory* had received of the Defendants previous to their bankruptcy. In the following term a motion was made for a new trial, but the Court refused to grant a rule to shew cause.

*Went. et al.,
December 18th.*

MATTHEWS *qui tam* v. GRIFFITHS and Others.

If a country
banker dis-
counting a bill
takes interest
or the whole
sum it has to
pay, and instead of
paying money for the bill gives notes payable in London at three days after sight, such
country banker is guilty of usury.

THIS was an action on the statute against usury. The declaration contained many counts on different loans.

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The Defendants being bankers at *Portsmouth*, and Mrs. *Stewart* the proprietor of a considerable salt-work near that place; on the 21st of *December*, 1792, *Thomas Knott*, the servant of Mrs. *Stewart*, drew a bill for £600, on *Sedley* her agent in *London*. The bill was payable to the Defendants or order, thirty days after date, and immediately it was drawn, taken to the Defendants, who gave their note for £600, payable three days after sight at *Fry and Robinson's*, in *London*. For this the Defendants received a discount of 5 per cent. calculating on the thirty days the bill had to run, but making no deduction on account of the three days the note had to run after sight, or of the three days grace which the bankers took thereon. *Knott*, on cross-examination, admitted that the money to be received on the draft was intended to be remitted to *London*, but swore that no money was offered to him by the Defendants, but that they gave him the note at three days sight, without asking any questions as to the mode in which he would be paid the money. All the other transactions between the parties were of the like nature, and another witness proved that these notes, payable at three days sight, were discounted when they arrived in *London*.

Lord KENYON said he was clearly of opinion that this was an usurious contract, whether the person discounting the bill chose to receive a note or money. If Mrs. *Stewart* chose to have a note payable in town, the Defendant should not have taken interest for the time that note had to run, but should compute his interest from the time it was payable; and on Mr. *Lubbock* the banker (who was on the Jury) saying that * whenever he sent a bill to *Bristol*, the drawee sent [* 202] a bill on *London* payable at thirty days after date, his

Lordship said, that the law in this case was clear, and that no usage whatever could controul it.

On this the parties compromised the cause, and agreed to withdraw a juror; which done,

Lord KENYON said, Now the cause is over I must say one word for myself. I am most clearly of opinion that this is usury. Whether the party consented or not can make no difference. She was entitled to receive in money the amount of the bill after deducting the interest for the time it had to run. The Defendants could not give a note payable in six days without deducting from the discount the interest for those six days. There may be cases where a country banker may be entitled to receive more than *£5 per cent.*; such was the case of the *Sudbury Bank (a)*, which came on in the place some years ago, and in which my opinion concurred with that of the Jury. But all men, lawyers or not lawyers, must agree on this case, because here was a second discount paid on the notes. The case is so clear, that no two men in the profession can entertain different opinions on it (*b*).

(*a*) *Winch qui tam v. Fenn.* 2 *T. Rep.* 52.

(*b*) The opinion of Lord Kenyon in this case was much questioned at the time, but his Lordship always adhered to it; and expressly recognized the decision in *Maddocks v. Hammet*, 7 *T. Rep.* 185. A similar question arose in the case of *Hammet v. Yed*, 1 *Bos. and Pul.* 144. but it was there considered rather as a question of fact for the Jury, than as a question of law, and the Jury having found a verdict for the

Plaintiff, the Court refused a new trial. In that case the Plaintiff being a banker in the country discounted bills at four months for *A.* and took the whole interest for the time they had to run. *A.* on being asked how he would have the money, directed part to be carried to his account, part to be paid in cash, and part by bills on *London*, some at three, some at seven, and some at thirty days sight, and the money was paid accordingly. On the motion for a new trial, the Chief Justice

Justice (*Eyre*) said, I cannot agree to the doctrine that this transaction was *necessarily* to be taken to be a mere transaction of loan, and not of remittance. I think there was room to consider it as a mixed case of loan and remittance. Had the banker told down the money, or tendered bank notes, and had *A.* put them into his pocket, or swept them into his hat; and then said,—“But I want to send money to *London*, will you take part of the money back and give me bills?” and the banker had accordingly done so and given these bills, I cannot see that there would have been any colour for calling it an usurious transaction. It was proved by the witness that the banker asked, “How will you have the money?” which short question includes, whether he would have it in cash or in cash notes, or in account, or whether he had any desire to have part of it remitted for him to *London*.—In the concluding part of his judgment, his Lordship added, “The transaction is always before a Jury. It is for them to say whether it is a device, or a

fair agreement on good consideration; whether if there be any overplus after the five *per cent.* taken for discount, it is properly referable to some lawful collateral consideration or not; if it be so referable we should do the grossest injustice, if instead of distributing the transaction into the parts of which it is composed, we were by a strict literal construction upon evidence to pronounce the contract to be what in substance it is not, a contract for mere loan and forbearance.—On the whole of the case, I see no ground sufficient to say that the verdict is wrong. I thought the transaction so far doubtful at the trial that I wished the Jury to consider whether the giving these bills on *London* was not a mere cover for an usurious contract. I said, that if the bills were drawn at a longer date than is usual in the course of business it ought to be construed as device; had they determined the other way I should not have quarrelled with their verdict; but I think there is no sufficient reason for granting a new trial.”

Thursday,
December 19th.

WILKES¹ and Others v. JACKS.

It is no excuse
for not giving
notice to the in-
dorse of a bill of
exchange that
the acceptor had
no effects.

ASSUMPSIT on a bill of exchange, drawn by *Vaughan* on *Eustace* and *Holland*, and indorsed by the Defendant.

The bill was dishonoured by *Eustace* and *Holland*, but no notice of such dishonour given to the Defendant. [* 203] * ant. The Plaintiffs' counsel attempted to cure this negligence by shewing that *Vaughan* the drawer had no effects in the hands of *Eustace* and *Holland*.

But Lord KENYON was of opinion that this circumstance would not avail the Plaintiffs. That rule only extended to actions brought against the drawer, the indorser was in all cases entitled to notice, for he had no concern with the accounts between the drawer and acceptor.

The Plaintiff then proved a letter of the Defendant's acknowledging the debt, and promising to pay it, on which evidence he recovered a verdict.

Friday,
December 20th.

GRANT v. JACKSON, Bart. and Others.

An admission in an answer to a bill filed by other creditors against the Defendant may be read as evidence against him.

THIS action was brought on a bill of exchange for £100, drawn in the year 1768, by *Hesenclever* and Co. on the behalf of the *American Company*, of which company it was admitted the Defendant.

If several are sued and one plead his bankruptcy, upon which the Plaintiff enters a *nolle prosequi* as to him, he may still give evidence of the admissions of such Defendant made before he obtained a certificate.

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ants were surviving partners. *Hesenclever* was also a Defendant, but having pleaded his discharge under a commission of bankruptcy, the Plaintiff had entered a *nolle prosequi* as to him.

Amongst other evidence the Plaintiff offered the answer of *Hesenclever* to a bill filed against him in the Court of Chancery by *other creditors*. At the time this answer was sworn, *Hesenclever* had become a bankrupt, but had not obtained his certificate.

Garrow, for the Defendants, objected to this evidence. In the first place he said that this being an * answer to a bill at the suit of other persons not parties to this record, was *res inter alios acta*, and therefore could not be evidence in the present cause.— [* 204] Secondly, that at the time *Hesenclever* put in this answer, he had no interest to dispute the Plaintiff's debt, for he had become a bankrupt, and was now not even a party to this record, being discharged by *the nolle prosequi*. It was much like the case of three being jointly indicted for a felony; if the bill was thrown out by the grand jury, as to one, his confession would be no evidence against the others.

LORD KENYON. This answer is not admissible evidence for all purposes. It could not be received to prove the partnership, but when once a partnership is established, the admission of one may bind all. If *Hesenclever* had obtained his certificate and been discharged by it, at the time he put in this answer, I think there would have been a formidable objection to the evidence, but at that time he was equally liable with the others: I do not receive it as evidence of a judicial proceeding, but as a naked admission. This

is

is not like the case put of a felony, there can be no partnership in a crime.

The Jury found for the Plaintiff, damages £245 including the principal money, 25 years interest, and £20. *per cent.* being the damages always allowed on the return of bills to *America*.

Costs paid to a Defendant in equity ought to be allowed to the Plaintiff in his costs at law. *Comme sensibie.*

Note. No bill had been filed for a discovery by the present Plaintiff, but many other persons had filed such bills, and *Erskine* having in his address to the Jury complained of the hardship of a Plaintiff in equity being obliged to pay the costs of a discovery, * Lord *Kenyon* observed that he had once heard Lord *Mansfield* say he thought, in such a case, the Court of Law ought to allow the costs paid to the Defendant in equity as costs at law, that he was struck with the propriety of the observation, and thought it would be a good rule to be adopted.

[* 205]

Saturday,
December 21st.

TARLETON and Others v. M'GAWLEY.

An action lies against the master of a vessel for purposely firing a cannon at negroes, and thereby preventing them from trading with the Plaintiff. And it is no answer to such action that the Plaintiff had not conformed to the law of the country in paying the duty due to the king for his licence to trade.

THIS was a special action on the case. The declaration stated that the Plaintiffs were possessed and owners of a certain ship called the *Tarleton*, which at the time of committing the grievance was laying at *Calabar* on the coast of *Africa*, under the command of ——— *Fairweather*. That the ship had been fitted out at *Liverpool* with goods proper for trading with the natives of that coast for slaves and other goods. That also before the committing the grievance

Fairweather

Fairweather had sent a smaller vessel called the *Banister* with a crew on board, under the command of one *Thomas Smith*, and loaded with goods proper for trading with the natives, to another part of the said coast called *Cameroon*, to trade with the natives there. That while the last mentioned ship was lying off *Cameroon*, a canoe with some natives on board came to the same for the purpose of establishing a trade, and went back to the shore, of which Defendant had notice. And that he well knowing the premisses, but *contriving and maliciously intending to hinder and deter the natives from trading* with the said *Thomas Smith*, for the benefit of the Plaintiffs, with force and * arms, fired from a certain ship called the *Othello*, of which he was master and commander, a certain cannon loaded with gunpowder and shot at the said canoe, and killed one of the natives on board the same. *Whereby the natives of the said coast were deterred and hindered from trading with the said T. Smith for the benefit &c. and Plaintiffs lost their trade.* [* 206]

Erskine, in his opening for the Plaintiffs, distinguished this case from that of *Ashiey* and *Harrison* (a), where Lord *Kenyon* had held the injury to be too remote to be the foundation of an action; that decision, he said, was founded on principles recognized by the law of *England* from the earliest antiquity. So long since as the days of *Bracton* it was held that to constitute a duress in law it must not be "*suspicio cujuslibet vani & meticulosi hominis, sed talis qui possit cadere in virum constantem; talis enim debet esse metus, qui in se contineat vitæ periculum, aut corporis cruciatum.*" (b) But in this case the Plaintiff's loss was not

(a) *Ante p.* 194. (b) *Bract. L. 2. c. 5.*

occasioned by the vain fears of the negroes, or even the fear of a battery being committed on them, but a fear arising from the danger of life itself.

The Plaintiffs called *Thomas Smith*, who proved the facts stated in the declaration; and further, that the Defendant had declared the natives owed him a debt, and that he would not suffer any ship to trade with them until that was paid; in pursuance of which declaration he committed the act complained of by the Plaintiffs. On his cross examination he admitted that by the custom of that coast no *Europeans* can trade

[* 207] * until a certain duty has been paid to the king of the country for his licence, and that no such duty had been paid, or licence obtained by the captain of the Plaintiffs' vessel.

Law, for the Defendant, contended that the Plaintiffs being engaged in a trade which by the law of that country was illicit, could not support an action for an interruption of such illicit commerce, and compared this case to an action brought for interrupting a Plaintiff in his endeavours to smuggle goods into this country, or alarming the owner of a house which the Plaintiff was about to break into. He also objected that this act of the Defendant amounted to a felony, and therefore could not be made the ground of a civil action, but he did not lay much stress on this objection.

LORD KENYON. This action is brought by the Plaintiffs to recover a satisfaction for a civil injury which they have sustained. The injury complained of is, that by the improper conduct of the Defendant the natives were prevented from trading with the Plaintiffs. The whole of the case is stated on the record,

cord, and if the parties desire it, the opinion of the Court may hereafter be taken whether it will support an action. I am of opinion it will. This case has been likened to cases which it does not at all resemble. It has been said that a person engaged in a trade violating the law of the country cannot support an action against another for hindering him in that illegal traffick. That I entirely accede to, but it does not apply to this case. This is a foreign law; the act of trading is not itself immoral, and a *jus positivum* is * not binding on foreigners. The king of the country [* 208] and not the Defendant should have executed that law. Had this been an accidental thing, no action could have been maintained, but it is proved that the Defendant had expressed an intention not to permit any to trade, until a debt due from the natives to himself was satisfied. If there was any court in that country to which he could have applied for justice he might have done so, but he had no right to take the law into his own hands.

The Plaintiff's had a verdict, and the parties agreed to refer the damages to arbitration.

Note. In the beginning of the cause the Plaintiff's counsel proposed asking the witness whether some of the negroes did not assign their fear of the Defendant as a reason for not trading with the Plaintiff's, but Lord *Kenyon* said that no declaration of the negroes could be received in evidence.

CASES IN K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER HILARY TERM.

34 GEORGE III. 1794.

*Friday,
February 14th.
At Guildhall.*

SNELL v. PHILLIPS one, &c.

If a bill filed against an attorney in vacation be intitled of the preceding Term, and the Defendant plead the statute of limitations, he may shew when it was in fact filed.

ASSUMPSIT on a promissory note of hand for £10. The Defendant pleaded the general issue and the statute of limitations.

The bill was filed as of *Trinity* Term last, and a witness was called by the Plaintiff, who proved a promise of payment in *July* or August 1787. He could not speak positively in which of those months the promise was made, but was sure it was not later than *August*.

The Defendant offered evidence, that though entitled of *Trinity* Term. the bill was not in fact filed till *October*.

Shepherd, for the Plaintiff, objected to this evidence, contending that though, for the purposes of justice, it was competent to a Plaintiff, to prove when
the

the suit was commenced, yet that the present Defendant ought not to be permitted to do it for the purpose of supporting his plea of the statute of limitations.

Lord KENYON said, the evidence should be received on the same principle, as it was permitted to a Plaintiff, to reply that a writ tested in term, was sued out in vacation according to the practice of the Court (*a*). The evidence was therefore received, and the Plaintiff nonsuited.

(*a*) *Vide Johnson and Another, Assignees, &c. v. Smith, Excutrix*, 2 Burr. 960. *Morris v. Pugh et al.* 3 Burr. 1241. It is now usual when a bill against an attorney is filed in vacation to make a particular entry. 5 T. R. 323.

KNIBBS v. HALL One, &c.

THIS was an action brought for the use and occupation of certain rooms; the Defendant pleaded the general issue, and gave notice of set-off for business done as an attorney, &c.

The Defendant had brought a cross action for this bill of costs, which was made the subject of a set-off. That debt had accrued, and the action on it was commenced, *before* the debt for which the present action was brought, had become due.

Garrow, for the Plaintiff, objected that these were not such *mutual* debts, at the time of the commencement of the Plaintiff's action, as would entitle the Defendant to sue the Plaintiff, and also to set-off his debt. To enable him to do so, he contended, that

It is no objection to the set-off of a debt, that the Defendant had commenced an action for the recovery of that debt, before the Plaintiff's cause of action accrued.

the debt for which the present action was brought should have been due at the time the Defendant commenced his action against the Plaintiff.

Lord KENYON over-ruled this objection; being clearly of opinion, that these were *mutual* debts within the meaning of the statute (a).

This and the other cause were referred to arbitration.

(a) *Vide Baskerville v. Brown*, 2 Burr. 1229. 1 Black. 293. S. C.

*Monday,
March 3d.
At Guildhall.*

MINETT and Others v. ANDERSON.

If a policy be on a ship bound to a foreign port until she is 24 hours moored in safety there; and previous to such ship's arrival at her destined port an embargo is laid on all English vessels in that port, and she on entering it is also detained, and her crew made prisoners of war, the assured is entitled to recover.

ASSUMPSIT on a policy of insurance on the ship *Hercules*, from *Bilboa* to *Rouen*, and until she had been 24 hours moored in safety there.

The ship arrived at *Rouen* on the 1st of February, 1793, an embargo having been previously laid on all English vessels in that port. The captain went on shore the day he arrived, and an embargo was the next day laid on his ship. He was afterwards permitted to land his cargo, and delivered it to the consignees, who were merchants at *Rouen*, but the ship was detained as a prize, and the captain and crew allowed subsistence as *prisoners of war*, from the time of their arrival.

The Defendant offered evidence to prove that no guard was put on board the ship, till some days after her arrival.

Lord

Lord KENYON. That would not alter the case. She was as much within the power of the enemy, as if a guard had been put on board the moment she arrived. She could not be said to be 24 hours, or a minute moored in *safety*, as far as relates to these Plaintiffs; for immediately she entered the port she was to all intents and purposes captured by the *French*.

Verdict for the Plaintiffs.

GREEN and Others v. ELMSLIE.

*Tuesday,
March 4th.*

THIS action was on a policy of insurance on the ship *Fly* from *Exeter* to *London*. The insurance was against capture only.

If a ship be driven into stress of weather on an enemy's coast and there captured, it is a loss by capture and not by the perils of the seas.

The ship while on her voyage was driven by a hard gale of wind on the coast of *France*, and was there captured by the enemy: she did not receive any damage from the wind.

Erskine contended, that this was a loss by the perils of the seas, and not by capture, and that therefore the Defendant was not liable on this policy.

But Lord KENYON said, the case was too clear to admit of argument; this was clearly a loss by capture, for had the ship been driven on any other coast but that of an enemy, she would have been in perfect safety.

Verdict for the Plaintiffs.

Friday,
March 7th.

SMITH and Others, Assignees, &c. of LEWIS and
POTTER v. JAMESON and Another.

If an assignee of
a bankrupt be
removed and as-
sign his interest
to the other
assignees, they
may maintain
an action for
money had and
received against
him, to recover
the money re-
ceived by him
as such assignee.
Comme semble.

ASSUMPSIT for money had and received.

Robert Jameson one of the Defendants, was a joint assignee with the Plaintiffs. but was afterwards removed by order of the Lord Chancellor; and then re-assigned all his interest to the Plaintiffs.

Whilst he was an assignee, he had received several sums of money which he had applied to the use of himself and the other Defendant, (with whom he was in partnership) with the approbation of the other Defendant, who knew that the money was part of the bankrupt's estate.

The present action was brought under the direction of the Lord Chancellor, to determine whether the estates of both Defendants were liable (they having become bankrupts) and they were to be examined as witnesses, if necessary.

Bearcroft objected to the action in point of form. He said that one Defendant having been an assignee of the bankrupt's estate, was himself entitled to receive this money, that *he* could not have maintained an action against *himself*, and having assigned only such an interest as he himself had, could not in point of form be a Defendant.

LORD KENTON. When an assignee assigns his interest, he divests himself of all right, and becomes a debtor to those who remain assignees. *Choses in ac-
tion*

tion have always been considered as assignable in cases of bankruptcy (a).

The point on which the Chancellor entertained a doubt was reserved for the opinion of the court.

(a) *Vide* Mr. J. Buller's opinion, 5 Term Rep. 603. 2 Co. Bank. Law, 128, and Wray, Assignee, &c. v. Barwis, ante 69. and De Cosson v. Vaughan, 10 East. 61. in which last case it was determined that the new assignee might sue upon a judgment recovered by the former assignee, and declare in general form as having been duly constituted and appointed assignee, &c.

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER TRINTY (a) TERM,

34 GEORGE III. 1794.

*Indorsed,
July 1794.
At Guildhall.*

SEDDONS v. STRATFORD.

A man who, at the request of the holder of a note, has put his name upon it and thereby been obliged to pay the contents to a bona fide holder, may recover the money paid from any person whose name is on the note, although he knew it was given on an illegal consideration.

ASSUMPSIT by the Plaintiff as indorsee of a promissory note against the Defendant, who was the payee and first indorser. Counts for money paid, &c.

The note in question was made by *Thomas Bell* and the consideration on which it was given, premiums for the insurance of tickets in the lottery. *Stratford* the Defendant indorsed it to *Clode*, who had notice of the illegal consideration on which it was founded: he offered it to *Cowley* in payment for some goods which he bought of him, but *Cowley* refusing to trust *Clode*

(a) I have no note of any importance at the Sittings after *Easter Term*.

with

with the goods unless he could get the name of some other person as an indorser of the note, *Clode* prevailed on the present Plaintiff to indorse the note, and then paid it to *Cowley*. When the note became due, the Plaintiff was obliged to pay it to *Cowley*. One of the Plaintiff's witnesses swore that the Plaintiff told him he knew the consideration on which the note was given. [* 216]

Shepherd, for the Defendant, objected, that on this evidence the Plaintiff could not recover, for, the note being given on an illegal consideration, an indorsee, to entitle himself to recover against the indorser should shew that he had paid a valuable consideration for it.

LORD KENYON. It has been frequently held in the Court of Chancery, that a mere volunteer, who has been obliged to pay money in consequence of an obligation he has entered into, is entitled to recover that money from the person on whose behalf he has paid it. The Plaintiff was *obliged* to pay this money to *Cowley* who came fairly and honestly by the note, and had a right to recover the value of it, from any person who appeared to be a party to it. The Plaintiff derives his title from him, and the Defendant being clearly liable to pay the money to *Cowley*, it is no injury to him to be obliged to repay it to the Plaintiff who has paid it for him.

Verdict for the Plaintiff.

LEDGER v. EWER.

If a bill of exchange be given in consideration of the Defendant entering into partnership with the Plaintiff, and the treaty is afterwards broken off, the Plaintiff is entitled to recover a verdict on the bill to the amount of the damages he has sustained and not to the full amount of the bill.

[* 217]

ASSUMPSIT on a bill of exchange for £100. drawn by the Plaintiff on the Defendant, and accepted by him.

* It appeared, that this bill of exchange was accepted in consideration of the Defendant being permitted to enter into partnership with the Plaintiff as a hatter. The Defendant was an indiscreet young man who had a considerable sum of money, and the Plaintiff having got possession of a shop, but *no business* and little money to support it, prevailed on the Defendant to enter into this engagement. The Defendant's friends disapproving the connection, it broke off, on which the Plaintiff brought the present action.

Lord KENYON left it to the Jury, to consider whether this was not a gross fraud on the part of the Plaintiff. If they should be of a contrary opinion, and think that the Plaintiff was entitled to recover any thing, they would then take into their consideration the damages which he had really sustained by the non-performance of the contract, and were not obliged to give the whole sum for which the bill was given in damages. (*a*)

The Jury found for the Defendant.

(*a*) *Vide Barber v. Backhouse and Others, ante 61.*

REX v. COLE,

Saturday,
July 12th.
At Westminster.

THIS was an indictment for concealing naval stores.

The informer against a person guilty of concealing naval stores, is a good witness to prove the offence, for the court is not obliged to inflict a pecuniary penalty.

Erskine, for the Defendant, objected to the competency of one of the witnesses for the Crown, he being the informer and entitled to a moiety of the penalty of £200. inflicted by the statute of 17 G. 2. on persons guilty of this offence.

* Lord KENYON. I have looked into the Act of Parliament, and think that no objection can be taken on that account, for the Court may order a corporal punishment and are not obliged to inflict any pecuniary penalty whatever, (a) and *non constat*, that they will do so. I mention this once for all, that no such objections may in future be taken.

[* 218]

The Defendant was convicted. (b)

(a) *Vide* *Rex v. Bland*, 5 Term Rep. 370.

(b) *Vide* *Rex v. Blackman, Espinasse* 95. and *Peake's Law Ec.* 152. [160.]

BOTHAM, Assignee, &c. v. SWINGLER.

THIS was an action of *assumpsit* for goods sold and delivered by the bankrupt to the Defendant, and for money had and received by him to the use of the bankrupt.

The Defendant had been servant to *Palmer* the bankrupt,

Tuesday,
July, 15th.
At Westminster.
A man who by his own examination on the *voir dire*, is rendered an incompetent witness; may be asked any question to shew his interest is at an end, though the fact by which his interest be destroyed is matter of record.

bankrupt, and in that character had received various sums of money from his debtors.

A man of the name of *Cave* was called to prove the payment of a sum of money to the Defendant on account of the bankrupt.

On the *voir dire*, he was asked whether he was not a creditor of the bankrupt; and on his answering in the affirmative, *Garrow*, the Defendant's counsel, objected to this evidence.

He was then asked by the Plaintiff's counsel, (*Erskine*) whether he had not himself become a
[* 219] * bankrupt, and his estate been assigned under the commission issued against him.

Garrow objected to this, contending that the proceedings under the commission should be produced.

LORD KENYON. On the *voir dire* he may give any answer which shews the situation in which he stands: he is made an incompetent witness by his answer to the question put by the Defendant's counsel, and it is impossible for the Plaintiff to come prepared with the materials necessary to shew him to be a bankrupt.

He offered to release his allowance to his assignees, and the attorney's clerk went out of court to prepare a release; but the other witnesses not being able to prove the payment of any money to the Defendant, the Plaintiff gave up his cause and was nonsuited.

REX v. The Inhabitants of the Parish of St.
PANCRAS.

Thursday,
July 15th.
At Westminster.

THIS indictment stated, that there was on, &c. and long before a certain ancient King's highway leading from the city of *London*, to the hamlet of *Highgate*, in the county of *Middlesex*, into and through the several parishes of *St. Mary Islington* and *St. Pancras* in the county aforesaid, for all the King's subjects, &c. That *a certain part of the said way between Battle Bridge and the hamlet of Highgate aforesaid, in a certain lane called or known by the name of Maiden Lane, in length three miles and in breadth fifteen feet* lying in * the parish of *St. Pancras*, was ruinous and out of repair, and that the inhabitants of that parish ought to repair, &c.

An indictment against a parish for not repairing one side of the road (the other side lying in another parish) ought to state that each parish was liable to repair *ed medium finem* &c. and not merely that a certain part of the road *in breadth 15 feet* was out of repair. A record of conviction on an indictment against a parish for not repairing a road is *conclusive* evidence of the liability of that parish to repair.
[* 220]

Erskine, in stating the prosecutors' case, said that all the lands on the *East* side of the lane were in the parish of *Islington*, and those on the *West* side in the parish of *St. Pancras*. That the parishes parted in the middle of the lane, and of course that each parish was liable to repair one half of the road.

Lord KENYON on this opening expressed a strong opinion that the prosecutors could not succeed on this indictment. That it should have particularly pointed out what part of the road laid in one parish and what in the other: but on *Wood* (who was also counsel for the prosecutors) saying, that this was the common mode of drawing these indictments, his Lordship permitted the cause to proceed: (a)

(a) *See* *Vide* *Stephens v. Whit-* held that the Plaintiff having
ler, 11 *East*. 51. where it was lands abutting on one side of a
public

The prosecutors having closed their case, the Defendants produced a copy of a record of conviction in this Court, on an indictment against the inhabitants of the parish of *Islington*, for not repairing this road called *Maiden Lane*.

Lord KENYON. I am clearly of opinion that this indictment is very inaccurately drawn, it should state that one half of the road lay in the parish of *Islington*, and the other in the parish of *St. Pancras*. But this record is *conclusive* evidence against the parish of *Islington*; for, by it, it is found that they are liable to repair the whole of the road called *Maiden Lane*. I admit that had there been an acquittal, the record could not have been evidence for the parish of *Islington*. The reason why it would not have been evidence for

[* 221] * them, is because some other parties might have indicted them, and those parties could not be bound by this record. There are many cases where a record is evidence against a person, though it is not so for him.

If the parish of *Islington* can shew fraud, it will vitiate this or any other transaction; but unexplained, this is conclusive evidence. On such a case as this the indictment should have stated that each parish was liable to repair *ad filum medium viæ*.

The Defendants were acquitted without further evidence.

public highway called *Shepherd's Lane*, might declare generally for a trespass in his close called *Shepherd's Lane*, and the Defendant must plead soil and freehold in

another in order to drive the Plaintiff to new assign the trespass complained of in the part of the lane which was his exclusive property.

PICKARD v. BONNER, Esq.

Friday,
July 18th.
At Guildhall.

ASSUMPSIT for money had and received.

Mr. *Bonner*, the Defendant, having a considerable place in the Post-office, and having occasion to employ several persons as clerks to him; the Plaintiff applied to one *Morris*, who was the Chief Clerk in the Defendant's office, to procure him such a situation, and agreed to give him £100. as a consideration for procuring the place. It was agreed, that the Plaintiff should go into the Defendant's office, and continue there six months on trial, that he should have at the rate of £80. *per annum*, for that time, and afterwards a further salary if the service continued. Afterwards the contract broke off, and it being discovered that *Morris* had paid this money over to the Defendant; this action was brought to recover it back.

Q. whether a person paying money on an illegal consideration, can recover it back in an action for money had and received.

* On his examination to-day, *Morris* swore that he did not receive this money on account of the Defendant, but entirely on his own account, and that he paid it to the Defendant in part of the debt due from him to the Defendant, of course this action could not be supported.

[* 222]

But Lord KENYON said that had it been proved that this was a transaction between the Plaintiff and the Defendant, the money could not, according to the doctrine which had been laid down by Lord *Mansfield*, be recovered back, for it being for the purchase of a place under government would be illegal, and therefore the parties being *in pari delicto*, the Plaintiff could

not

not succeed in a court of justice (*a*). Lord *Holt* had been of opinion that such an action might be maintained (*b*), and his Lordship said, he was inclined to agree with that opinion, though he certainly spoke with great diffidence when giving an opinion contrary to that of Lord *Mansfield*, but he thought it would be much more for the benefit of the public, if a person who had paid his money under such a contract were permitted to recover it back. (*c*).

The Plaintiff was nonsuited.

(*a*) See *Vide Walker and Chapman*, cited *Dougl.* 454. in which case the Plaintiff was permitted to recover back the money, because the contract remained executory.

(*b*) *Wilkinson v. Kitchen*, 1 *Ld. Raym.* 89.

(*c*) *Vide Lacausade v. White*, 7 *T. Rep.* 535. *Hewson v. Hancock*, 8 *T. Rep.* 575, and *Vandyck v. Hewit*, 1 *East.* 96.

[* 223] * BRISTOW and Others, Assignees, &c. v. EASTMAN.

Assumpsit for money had and received, lies against an infant to recover money embezzled by him. Comme sensible, 1 T. sp. Cas. 172. S. C.

THIS was an action for money had and received to the use of the bankrupts before they became bankrupts.

The Defendant had been apprentice to the bankrupts, who were merchants, and, during his apprenticeship, had been entrusted by them to make entries at the Custom-house, and pay other sums of money on their account. He had frequently charged larger sums of money than those he actually paid, and the present

present action was brought to recover back the overcharges.

The Defendant attempted to defend himself, on account of his being an infant at the time.

Lord KENYON said the question was new, and had not been decided; but he was of opinion that this action, though in *form* arising *ex contractu*, in fact arose *ex delicto*, and as he could not have defended himself by reason of his infancy if an action of *trover* had been brought for the money, so he ought not to be permitted to defend himself on that ground, in this action (a).

The Plaintiffs proved that the Defendant acknowledged the fraud, and promised payment after he came of age, so that the point was not determined; the Plaintiffs obtaining a verdict on this evidence.

(a) And on the other hand where the cause of action is the breach of a contract, the Plaintiff cannot deprive the Defendant of the protection of his infancy by declaring in tort; thus, where an infant hired a mare of the Plaintiff to go a journey in the course of which the mare was strained; and the Defendant to an action of tort pleaded his infancy in bar, such plea was on demurrer holden to be good. *Vide Jennings v. Randall*, 8 T. Rep. 335.

* RICH and Another v. TOPPING.

[* 224]

Saturday,
July 19th.
At Guildhall.

THIS was an action of *assumpsit* by the indorsees of a bill of exchange against the acceptor.

The Defendant proposed calling *T. Topping* the drawer and indorser of the bill, to prove that he had

given

The drawer of a bill or exchange given for an usurious consideration, is a good witness to prove the usury in an action against the acceptor upon being released by him. 1 Esp. 177. S. C.

given it to the Plaintiffs on an usurious consideration. The acceptor had released him.

Erskine, for the Plaintiffs, objected that he was not a competent witness, although released by the acceptor. He admitted he would be a good witness to prove it void, *as against the acceptor*, on account of the want of consideration, &c. being known to the Plaintiffs, but he could not be a witness to prove usury, which would entirely defeat the bill, and discharge himself as well as the acceptor. If an action for usury were brought, he could not be a witness.

LORD KENYON. I should have been of opinion there was ground sufficient to reject his testimony, if he had not been released by the acceptor, because he would have been liable to him; but after a release the acceptor could not call upon him. I will not anticipate whether he would be a witness in an action for usury. But the judgment in this cause could not be evidence either for or against him, in another action. It would not go one step towards proving usury.

The Defendant, by the evidence of *Thomas Topping* and other witnesses, made a strong case, and Lord *Kenyon's* direction was in his favour, but the Jury found for the Plaintiffs (*a*).

(*a*) It should seem that according to the rules now laid down, the drawer would have been a good witness in this case without any release, as standing indifferent between the parties. If accepted for his accommodation by the Defendant, he would not be liable to him unless the Plaintiff recovered. In respect of his liability to him, therefore he was interested to defeat the action, but

the moment he had succeeded in doing so, he himself became liable to an action as an indorser. The verdict in the present case would not avail him in that action, nor could his own evidence be used on his behalf, so that he would not be benefited by the verdict. *Vide Birt v. Kershaw*, ante 175, note. *Phethcon v. Whitmore*, ante 40. And *Humphrey v. Moxon*, ante 52.

SMITH

SMITH and Others v. CLARKE.

Monday,
July 21st.

THIS action was brought by the Plaintiffs as indorsees of a bill of exchange against the acceptor.

When the payee of a bill of exchange has made an indorsement *in blank* thereon, no subsequent indorsee can restrain its negotiability by a *special* indorsement.

The bill was indorsed *in blank* by the payee, and, after several indorsements, it came to one *Jackson* (whose assignees had indemnified the present Defendant) under a *special* indorsement to him or order. *Jackson* sent it to *Muir* and *Atkinson*, and they discounted it with the Plaintiffs, but *Jackson* had not indorsed it. The Plaintiffs had struck out all the indorsements except the first.

Law, for the Defendant, objected that this special indorsement had restrained the negotiability of the bill, and that the Plaintiffs could not recover without an indorsement by *Jackson*.

LORD KENYON. 'The fair holder of a bill may consider himself as the indorsee of the payee, and strike out all the other indorsements. This special indorsement being made after the payee had indorsed it, cannot affect the title of the present Plaintiffs.

Note. The Plaintiffs afterwards proved a letter from *Jackson* to *Muir* and *Atkinson*, desiring them to discount this and other bills, but Lord *Kenyon* thought the Plaintiffs' case sufficiently made out without this evidence.

Verdict for the Plaintiffs. (a)

(a) *Vide* *Edie v. East-India Company*, 2 Burr. 1216. *Peacock v. Rhodes* and Another, Dougl. 611. *Anchor v. Governor and Co. of the Bank of England*, ib. 615.

Wednesday,
July, 23d.

SCOTT and Another v. LARA.

To support an action for a false assertion as to the circumstances of a third person, it must appear that the Defendant intended to impose on the Plaintiff, and that the Plaintiff relied on his information.

THE declaration stated that one *David Valentine* having applied to the Plaintiffs to purchase goods on credit, and the Plaintiffs being unacquainted with the credit of *Valentine*, and not knowing whether he was a person safely to be trusted, refused to sell him the goods until they should have made enquiry about his circumstances and credit. Whereupon *Valentine* referred the Plaintiffs to the Defendant *Moses Lara*, as a person well acquainted with his circumstances and credit. That thereupon the Defendant was requested by one *Moses Lindo*, the Plaintiffs' agent in that behalf, to inform them of the credit and circumstances of *Valentine*, when the Defendant wrongfully, &c. *intending to defraud the Plaintiffs, and to induce them to sell the goods to the said Valentine* affirmed and asserted to said *Moses Lindo*, that *Valentine* was a safe man, in good circumstances, and might be safely trusted. Whereas in truth and in fact the Defendant knew him to be the reverse, &c. That Plaintiffs thereupon sold the goods to *Valentine* on credit, whereby they lost the value thereof, &c.

Moses Lindo swore that he was desired by the Plaintiffs to enquire *Valentine's* character and circumstances of the *Laras* (there being two brothers in partnership); that he enquired of *Benjamin Lara*, the Defendant's brother, as to his credit, and whether he might be trusted; *B. Lara* answered in the affirmative, and said that he and his brother *Moses* were to enter into partnership with *Valentine* on the first of June then next, and that he had inspected his books. *Lindo* afterwards

terwards saw the Defendant, and told him the conversation which had passed between himself and *B. Lara*. The Defendant confirmed the character of *Valentine* given by his brother, and said he might be safely trusted. *Lindo* did not mention to the Defendant that he was desired by the Plaintiffs to apply to him, nor did he communicate to the Plaintiffs the conversation he had with the Defendant, but only mentioned the information he had received from *B. Lara*.

LORD KENYON. The Plaintiff cannot, on this evidence, recover against the present Defendant, though he might possibly against *Benjamin Lara*. There are two important links in the chain wanting to bring it home to the Defendant. *Lindo* did not communicate to him on whose account he applied, or to the Plaintiffs the information which the Defendant had given. Both these circumstances are necessary to sustain the action, for it must appear that the lie was told for the purpose of imposing on the Plaintiffs, and that they relying on that information were deceived.

• The Plaintiffs were nonsuited (*a*).

(*a*) *Vide Pasley and Another v. Freeman*, 3 T. Rep. 51. *Haycraft v. Ureavy*, 2 East. 92.

KINGSTON v. PHELPS.

ASSUMPSIT on a policy of insurance.

The Plaintiff called a witness to prove that when the other underwriters referred the causes commenced

A submission to arbitration may be given in evidence on a count on the original promise.

against them, on this policy, to arbitration, the Defendant consented to be bound by the award, and that the arbitrators had decided in favour of the Plaintiff.

[*228] . * *Law*, for the Defendant, objected to this evidence being received on this declaration, and contended, that to have the benefit of it, the Plaintiff should have had a count on the award.

LORD KENYON. This is a good evidence on this declaration, on the same principle as admissions are daily given in evidence.

The witness not proving any agreement on the part of the Plaintiff to be bound by the award, his Lordship said there was no mutuality, and therefore the Defendant's agreement was a mere *nudum pactum*, and not binding upon him.

The Plaintiff then called witnesses to prove the loss, and on their evidence obtained a verdict.

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER MICHAELMAS TERM.

35 GEORGE III. 1794.

FORD v. FOTHERGILL.

*Saturday,
November 29th.
At Westminster.*

ASSUMPSIT for work and labour as a taylor.

The Defendant pleaded that at the time of making the promises he was an infant; and the Plaintiff replied that the cloaths furnished were necessary for him.

It is incumbent on a tradesman before he trusts an infant with what may appear necessary, to enquire whether he is provided by his friends.

The case appeared to be shortly this. The Defendant, being under age, came to the house of the Plaintiff, in company with a gentleman who was previously his customer, and ordered a coat, waistcoat and two pair of breeches, which were to be sent to the *Grecian Coffee-house*, and were accordingly sent there.

The Defendant proved that at this time he was provided by his father with all things necessary for his support. He had been very extravagant, and his father

ther had, in the course of the year 1793, when this debt was contracted, paid many other debts contracted with other *taylors* to a large amount.

[* 230] * *Mingay*, for the Plaintiff, contended, that it was not incumbent on the Plaintiff to traverse the town to enquire the Defendant's fortune and character. He came to him as a man of fortune and figure, introduced and recommended by a gentleman of fortune. If the Plaintiff thought them necessary for his state and degree, that would maintain the issue. In the way he appeared to the Plaintiff he could not know but that he had an estate of £500 *per annum*.

LORD KENYON (after lamenting the profligacy and extravagance of the youth of the present day, and the encouragement they received from persons trusting them with things for which they had no occasion) said, that from the earliest ages and in all countries, the law had protected men at the time of life when they had not wisdom to protect themselves. Nothing is clearer in the law than that an infant cannot contract a debt except for necessaries. It is absolutely necessary that he should have the power of making that contract, otherwise he would starve. As to the Plaintiff not knowing his fortune it is no excuse, it was incumbent on him to enquire into that, and to prove it to the Jury. Whether he was living with his father or not, the person who dealt with him was bound to enquire and know who he was. He was living at a coffee-house, itself no mark of a wary disposition, the Plaintiff should have enquired there, and gone to his father and enquired of him whether he was in want of these cloaths. Circumstanced as this case is, such an enquiry ought to have been made (a).

(a) *Vide Bainbridge v. Pickering*, 2 *Blac.* 1325.

Notwith-

Notwithstanding this direction, the Jury found a verdict for the Plaintiff.

Bearcroft for the Defendant.

REED v. PASSER and Others.

*Tuesday,
December 2d.
At Westminster.
The Fleet books
are no evidence.*

SEVERAL issues were directed by the Court of Chancery to be tried between these parties; but the first and only issue which was contested between them was, whether the Plaintiff was the heir at law of *Ann Botham* deceased.

The Plaintiff and *Ann Botham* were brother and sister, but it was contended by the Defendants, that their father and mother were never married, and therefore that they were both illegitimate.

Garrow, in opening the Plaintiff's case, said that he should prove by the friends and relations of this father and mother, that they were generally looked upon in the family as man and wife, and visited and treated as such. In addition to this, he said, he should produce one of the Fleet registers, which contained an entry in *March 1753* of a marriage being celebrated between them.

Lord KENYON. I must be consistent with myself; I did hold, on the last Home Circuit, that these books were no evidence whatever. Mr. J. *Heath*, I am told, afterwards ruled otherwise at *Shrewbury (a)*, but I cannot depart from my opinion. I have since looked into the books, and find my opinion strongly

(a) *Doe dem. Passingham v. Lloyd, Shrewsb. Summer Assizes, 1794.*

fortified by authorities. There is a case of *Morris* and *Miller* (a) in Sir *James Burrows'* Reports which is in favour of the opinion I have given; there it was taken for granted that such books could not in any case be received as evidence. This is my opinion; it must guide *my* conduct. If others differ from me, it is very fit that my opinion should be considered.

But the general reputation of the family that the parties were married in the Fleet, is good evidence.

When a witness was called to prove the general reputation that they were man and wife, *Mingay*, for the Defendants, asked him whether the parties did not say they were married in the Fleet; and upon the witness answering in the affirmative, objected to the testimony, contending that as the Fleet books were themselves no evidence of a marriage, any reputation of a marriage *there* was also inadmissible.

LORD KENYON. The books cannot be received, because they come from tainted quarters, but the declaration of the parties that they were married there is good and strong evidence. A marriage in the Fleet at that time was good and legal. I think, though I do not speak meaning to be bound, that even an agreement between the parties *per verba de præsenti*, was *ipsum matrimonium* (b).

The Plaintiff having made a strong case by this kind of evidence, and no answer being given to it by the Defendants,

The registration of a marriage is not absolutely necessary, to make it valid.

LORD KENYON said, that even since the marriage act it was not essential to the legality of the marriage * that there should be a registration, but the act of par-

[* 233]

(a) 4 Burr. 2057.

(b) *Vide Holt v. Ward* *Clarencieux*, 2 Stra. 937. & 8. *Swinb.* 74. 2 Salk. 138. 6 Mod. 155. and *Rex v. Inhabitants of Brompton*, 10 East, 282.

liament making it criminal in the clergyman not to do it, it is generally done. But still a marriage, since that act might be proved by reputation as well as one before. (a)

The Jury found for the Plaintiff. (b)

(a) *Vide Rex v. Prestonnex* and also by Mr. Justice *Le Blanc*,
Travashum, *Bul. N. P.* 114.

(b) *Vide Standen v. Standen*,
ante 32. and *Lawrence and Others*
v. Dixon, *ante* 136. The Fleet
Books were also rejected by Lord
C. J. *De Grey*, in *Howard v. Bur-*
tonwood, *C. B.* Sittings at *West-*
minster, after *Trin. T.* 1776 *M. S.*
and in former cases by Lord
Mandwicke and Lord C. J. *Lee*;

in *Cooke v. Lloyd*, *Salop Summer*
Assizes, 1803; but in the case of
Haywood v. Firmin, *C. B.* Sittings
after *East. T.* 1766. *M. S.* Lord
C. J. *Pratt* held, as Lord *Kenyon*
did in the present, that the decla-
rations of the mother that she had
been married in the Fleet, were
good evidence after her death.

JONES v. BROWN and Another.

Thursday,
December 4th.

TRESPASS for an assault on *Joshua Brown*,
the Plaintiff's son and servant, *per quod servi-*
tium amisit.

The assault being proved, the Plaintiff's counsel
proceeded to prove that *Joshua Brown* (who was a lad
about 14 or 15 years of age), was employed about
his father's business.

Lord KENYON said such evidence was unnecessary.
If he lived in his father's family, and under his pro-
tection, that was sufficient to maintain the action.

Verdict for the Plaintiff (a).

(a) *Vide Fors v. Wilson*, *ante* 55. accord.

To maintain an
action for as-
saulting Plain-
tiff's infant son
per quod, &c.
proof of his
living under his
father's roof, is
sufficient evi-
dence of service.

DICKENSON

Friday,
Dec. 5th.

DICKENSON v. BROWN and Others.

A justice's warrant continues in force until fully executed. If the putative father of a bastard child agrees to indemnify the parish, they may demand any security they think proper.

TRESPASS for breaking and entering the Plaintiff's house, and imprisoning him. The Defendant justified the trespass, under a justice of peace's warrant to apprehend the Plaintiff as the putative father of a bastard child, in order to indemnify the parish or enter into a recognizance for his appearance at the sessions.

To this plea the Plaintiff made a new assignment, stating that after the Plaintiff had been apprehended, and executed a bond to indemnify the parish, and at a different time from that stated in the plea, &c. the Defendants committed the trespasses complained of.

It appeared that on the 2d of *October*, 1793, the Plaintiff was apprehended under the warrant, and then went to the vestry, where he agreed to enter into a bond with two sureties to indemnify the parish. He and one of the sureties then executed the bond, but the other surety did not. On the 17th of *January*, 1794, the Plaintiff was again apprehended, by the direction of the parish officers, in order to compel him to procure another surety. No fresh warrant had been obtained.

Mingay & 'Espinasse for the Plaintiff, contended that the second arrest was illegal and could not be justified, that when the Plaintiff had been once apprehended, the warrant was executed, and that, supposing the parish were not sufficiently indemnified, yet before he could be apprehended a second time, a new warrant should have been obtained for that purpose.

Lord

Lord KENYON said, that the warrant of a magistrate was not returnable at any particular time, but continued in force until it was fully executed and obeyed, * though it were seven years, provided the magistrate so long lived. That the warrant was not in this case fully executed, the parish officers had a right to have any security they required, however large, if the business was settled in that way. This was no hardship on the Plaintiff, for he was not obliged to enter into any such security, but might enter into a recognizance to appear at the sessions, and abide such order as they should make. (a)

[* 235]

Verdict for the Defendants.

vide Stat. 6 Geo. 2. c. 31, and 1 Burn's Just. 185.

SNELL v. RICE.

ASSUMPSIT for work and labour.

The Defendant was a married woman, and the Plaintiff having obtained a regular judgment, the Court set it aside, and let the Defendant in to plead, she undertaking not to plead or take advantage of her coverture.

If a Defendant be let in to plead on the terms of not availing herself of her coverture, she cannot shew that the Plaintiff trusted her husband and not her.

Mingay, for the Defendant, offered to prove that the Plaintiff knew the Defendant's husband, and did this work on his credit. He contended, that this was evidence in this case, on the same principle that evidence was daily admitted, to prove that the work

was

was done on the credit of a third person and not of the Defendant; and it was not to be considered as availing herself of her coverture.

But Lord KENYON thought this inadmissible evidence. The true construction of the rule is, that the Defendant should only dispute the *quantum* or justice of the debt: and not be permitted in *any way* to shew that her husband was liable, and so turn the Plaintiff round.

Verdict for the Plaintiff.

[* 236]

Saturday,
December 6th.

The privilege of replying in a criminal prosecution, when the Defendant does not call witnesses, is confined to the Attorney General.
Comme auable.

* REX v. The Earl of ABINGDON.

THIS was an information against the Defendant for a libel on Mr *Thomas Sermon* an Attorney.

The Defendant having spoken in his defence, but not called any witnesses, *Erskine* for the prosecution claimed the privilege of a reply, contending, that the counsel for the Crown had always this privilege; and *Garrow*, who was on the same side, said it had frequently been exercised.

Gibbs, as *amicus curiæ* said, he had known several instances in which this privilege had been exercised on the circuit; and *Mingay*, who was also out of the cause, said he always understood that every counsel for the Crown, had the privilege, though it was rarely claimed.

But

But Lord KENYON said, that though the Attorney General had undoubtedly this privilege, yet he never knew any other counsel for the Crown claim it, and he would not make the precedent in this cause.

The Defendant was convicted. (d)

(a) *Rex v. Smith*, Sittings after *Michaelmas*, 37 Geo. 3. The Defendant was indicted for a libel, and called no witnesses, but Lord *Kenyon* permitted the prosecutor's counsel to reply, though this case was cited to him by Mr. *Gurney*, the Defendant's counsel, as he told me.

GREEN v. JACKSON.

Monday,
December 8th.
At Westminster.

THIS was an action of *assumpsit* against the Defendant, for negligence and misconduct as an Attorney. The declaration stated, that *John Pott* being indebted to the Plaintiff, &c. she applied to the Defendant (he the said *Nathan* being then and there * one of the Attornies of the Court of Session of the county of *Chester*), and then and there retained and employed him, &c.

An averment that the Defendant is an Attorney of a particular Court is not proved by the production of his bill of fees for business done in that Court.

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The Plaintiff had, on the third instant, given the Defendant notice to produce his admission as an Attorney of the court of *Chester*; and it not being produced, her counsel offered his bill for business done in that Court, as sufficient evidence to prove the averment.

Bower, for the Defendant, objected that this was no evidence of the Defendant being an Attorney of the Court of Session.

Garrow,

Garrow, for the Plaintiff, answered, that having acted as an Attorney in that Court, he could not now say that he was not so : and *Wood*, who was on the same side, said a case had lately come before the Court, where in an action by an Attorney for words spoken of him in his profession, it was held that he was not obliged to prove his admission (a).

Lord KENYON said, that by this declaration the Plaintiff had encumbered herself with too much proof. If she had stated him generally to have been employed as an Attorney, the evidence would have been sufficient. But his bill does not prove him to be an Attorney of that Court. As an Attorney of this or any other Court in *Westminster Hall*, he had a right to practice in that Court, using the name of an Attorney there.

His Lordship was about to direct a non-suit when a juror was withdrawn by the consent of the parties

(a) *Vide Berryman v. Wise*, 4 Term Rep. 366.



[* 238]

Wednesday,
December 10th,
At Guildhall.

Assignees of a
bankrupt are not
liable to be

charged for rent
promises as-
signed to them
as they take
possession.

* *BOURDILLON v. DALTON and Others.*

COVENANT against the Defendants as assignees for rent.

The lease had come by several mesne assignments to *Thomas Bell*, who had become a bankrupt, and his estate was assigned to the Defendants by the commissioners.

The

The Defendants had never taken possession of the premises.

Lord KENYON. They cannot be charged as assignees of the estate of *Bell*, unless they have taken possession of the premises. This resembles what is called the *damnosa hereditas* in another law (*a*). If the assignee takes possession of it, he must take it with all its charges; but if he chuses to abandon it, it cannot be forced upon him.

The Plaintiff was nonsuited (*b*).

(*a*) *Vide Domat's Civil Law* "of Heirs and Executors," B. 1. Tit. 1. s. 5. and note c.

(*b*) *Vide Eaton v. Jaques, Dougl.* 438. *Waller v. Reeves, ibid.* 444.

Note 1. When a tenant from year to year becomes a bankrupt, and his assignees enter into possession, they are liable to pay rent for the time during which they occupied only, and not the rent due from the bankrupt before his bankruptcy, *Nash v. Tatlock*, and *Others*, 2 Hen. Blac. 319. So the mere putting up the premises to auction, for the purpose of ascertaining the value, without describing themselves as owners of the property, is not a sufficient taking possession to charge them as assignees, *Turner v. Richardson*, 7 East. 335; but if the assignee on being applied to by the landlord to know whether he will take possession, answer, that if he cannot let it by *Lady-Day*, he will give it up; and keep pos-

session accordingly, he thereby becomes assignee, and cannot quit till the end of the term; for though he may refuse it at first he cannot take it in part, and afterwards reject it when he finds it will not answer. *Broome v. Robinson*, cited 7 East 339. In these cases the bankrupt continued liable on his covenant or promise for the future accruing rent. See *Mills v. Auriol*, 1 H. Blac. 433. 4 T. Rep. 24. *Boot v. Wilson*, 8 East 311. but by Stat. 49 Geo. 3. c. 121. s. 19. it is enacted, that if the assignees shall accept the lease or agreement for a lease, and benefit therefrom as part of the bankrupt's estate, the bankrupt shall not be liable to pay the rent accruing after such acceptance, nor be liable to be sued in respect of any subsequent non observance of the condition, covenants, &c. therein contained; provided that it shall be lawful in all such cases for the lessor or person

person agreeing to make such lease, his heirs, &c. if the assignees shall decline upon their being required so to do, to determine whether they will or will not accept such lease or agreement for a

lease, to apply to the Lord Chancellor, Lord Keeper, or Lords Commissioners, &c. praying that they may either so accept the same, or deliver up the lease or agreement, &c. who may make an order accordingly.

Thursday,
December 11th.

BUTLER v. RHODES.

If a creditor look over a deed of composition proposed by his debtor, and send a letter to the debtor's attorney expressing his approbation of it, and other creditors afterwards execute the deed, he cannot afterwards refuse to execute and maintain an action.

ASSUMPSIT for goods sold and delivered.

The Defendant had executed a deed, whereby he assigned all his property to trustees for the benefit * of his creditors, and they agreed to accept a composition on their respective debts.

Several creditors had executed the deed, and before some of them had done so, the Plaintiff had also agreed to accept the composition, and the deed had been perused by his attorney, who had sent a letter to the Defendant's attorney, expressing his client's approbation of it. The Defendant's counsel contended, that under these circumstances the Plaintiff could not recover.

Garrow and *Park*, for the Plaintiff, objected that none of the cases which had been decided went so far as to determine that in a case like the present, the Plaintiff could not withdraw himself from the composition. Here the Plaintiff had never in fact executed the deed, nor did it even appear that this letter of the attorney had been shewn to any other creditor to induce him to execute the deed.

Lord

LORD KENYON was of opinion, that the other creditors must have been induced to enter into this agreement on the faith of the Plaintiff also being a party to it. The transaction speaks for itself. Besides, the Defendant himself had been induced to commit an act of bankruptcy, by assigning all his effects.

The Plaintiff was nonsuited (a).

(a) *Vide Heathcote and Others v. Cruikshanks*, 2 Term Rep. 24. *Cockshott v. Bennett*, *ibid.* 763. *Jackson v. Duchaire*, 3 Term Rep. 551. *Jackson v. Lomas*, 4 Term Rep. 166.

* REDDIE v. SCOLT, Clerk.

[* 240]

TRESPASS for assaulting and debauching *Helen Reddie* the Plaintiff's daughter and servant *per quod servitium amisit*.

A father who has permitted a married man to visit his daughter as a suitor, cannot maintain an action against him for seducing her.

It appeared, that the Defendant came frequently to the Plaintiff's house, and was received and entertained as a suitor of the daughter. During the time this intimacy continued, the father received an anonymous letter informing him that the Defendant was *a married man*, and a great libertine, and cautioning him against permitting him to be too familiarly acquainted with his daughter. The Plaintiff mentioned this letter to the Defendant, when he confessed he had a wife still living, but represented her as a woman of so abandoned a character, that he could not live with her.

S

He

He told the Plaintiff that they had been parted six years, and at the end of the seventh, he should be able to obtain a divorce, and would then marry his daughter. He added, that his wife was worn out with disease and could not long live. It also appeared, that the Plaintiff had been warned by another person to break off his acquaintance with the Defendant, notwithstanding which he permitted him to continue his visits and go *alone* with his daughter to the Theatre; the consequence of which was the accident which gave rise to the present action.

Lord KENYON said, that however reprehensible the conduct of the Defendant might be, and the unfortunate girl seduced, entitled to pity, still it must be recollected that the father was the Plaintiff on this record, and if *he* had misconducted himself, this action [* 241] * could not be maintained. His Lordship thought that the Plaintiff had been guilty of gross misconduct, in suffering the Defendant to continue his visits, after he knew that he was a *married man*, and had received a caution against admitting him into his family. He therefore found himself obliged to call the Plaintiff, though the conduct of the Defendant was so gross that he would certainly represent him to the Bishop.

The Plaintiff was nonsuited. (a)

(a) *Vide Hodges v. Windham, ante 39.*

LEWIN and Others v. The EAST INDIA Company. *Saturday, December 13th.*

THIS was a special action on the case. The declaration stated, that the Plaintiffs being owners of a ship called the *Vansittart*, by a charter-party of affreightment, dated 13th of *August*, 1788, let the same to the Defendants to freight for a certain voyage with her to be made *in trade and also in warfare*, as the said company, or any their governors, &c. should require or direct. That the Plaintiffs thereby covenanted, that the ship should be used by the company *in trade or warfare*, if required by the company, *that the master should observe the orders of the company*, and that they should have power to displace him or any other officer or officers belonging to the ship. The declaration then stated, that the ship sailed on her voyage, and was engaged in the service of the Defendants; and that they, *without the knowledge or consent, and against the will* of the Plaintiffs * employed the said ship in and upon a certain voyage and service, not being a voyage and service of trade or of warfare, and not being a voyage or service mentioned in, or intended to be warranted by the charter-party, or upon which the said ship ought to have been employed; to wit, in and upon a certain voyage and service of observation and discovery, in and to a certain dangerous sea, straight, or passage, situate to the *Eastward* of a certain island called the island of *Banca*, for the purpose of exploring the said sea, straight, or passage: and wrongfully, &c. without the knowledge, &c. kept and detained the said ship in the said

If a ship be chartered to the *East India Company* for the purpose of *trade or warfare*, and they order her on a voyage of *discovery*, against the consent of the owners, whereby the ship is lost, the owners may maintain an action on the case. *Aliter*, if the owners consent to the voyage.

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voyage of observation and discovery for a great length of time; by reason whereof the ship, in the course of the said voyage, &c. was stranded, sunk, and wholly lost.

The Plaintiffs proved that the *East India Company* wishing to establish a passage by the Straights *Eastward* of the island of *Banca*, instead of the usual passage through the Straights of *Banca*, had given Captain *Wilson*, who had the command of the *Vansittart*, orders to take his passage to *China* that way, and to explore the coast as he past. That in obedience to those orders, the Captain sailed on that voyage, and in the course of it the ship struck on a coral rock and was lost. On his cross examination, Captain *Wilson* said, that Mr. *Lewin*, the ship's husband, had retired from the cares of business, and that his son, who was also a Plaintiff in this cause, transacted his business. That he had received his orders from the Company before he left *England*, and had communicated them to Mr. *Lewin* the son, who did not object to the voyage.

[* 243] *Lord KENYON. The Captain was bound to obey the orders given him by the Company. These orders were certainly not warranted by the terms of the charter-party, and therefore had the case rested on the orders, I should have thought that the Plaintiffs had a right to maintain the present action. But the consent of Mr. *Lewin*, junior, who was agent of the ship's husband, entirely alters the case, for the ship proceeding from *England* without any objection from him, it must be taken that she sailed with his consent, and therefore proceeded at the risk of the owners. His Lordship added, that had there been any collusion

collusion between the Company and one part owner, that would not have bound the others; but nothing of that kind appeared to have been intended in the present case.

The Plaintiffs were nonsuited.

Erskine, Bower and Gibbs for the Plaintiffs.

Bearcroft and Rous for the Defendants.

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2. In an action of *assumpsit* on an express promise to pay for the maintenance of a bastard child, of which the Defendant was the putative father, it is no defence that he has since discovered that the child was not begotten by him. *Shaw v. Whiteman*. 29
3. In *assumpsit* for money *had and received*, to recover back money paid to the Defendant, it is not necessary to shew that *he knew* he was not entitled to receive it. *Robinson v. Anderton*. 94
4. For money paid laid out and expended, lies at the suit of a sheriff's officer who has discharged the Defendant on payment of the sum indorsed on the writ, and has been obliged to pay the rest of the debt. *Cordron v. Lord Massarene*. 143
5. But not at the suit of a gaoler who has been obliged to pay money in consequence of a *voluntary* escape, though such escape was permitted through ignorance of the law. *Eyles v. Faikney* n. 144
6. Q. Whether a person paying money on an illegal consideration, can recover it back in an action for money *had and received*. *Pickard v. Bonnor*. 221

ATTORNEY,

See CONFIDENCE, No. 1. 3. LIMITATION of ACTIONS, No. 5, 1. An

A TABLE OF THE PRINCIPAL MATTERS.

1. An agent to a country attorney, is not obliged to deliver a bill signed previous to the commencement of an action for his fees. *Bridges v. Francis* 1. *Jones v. Price n.* P. 2
2. But an Attorney cannot maintain an action against his Client, even for the money expended by him in a cause without delivering a bill signed. *Miller one, &c. v. Towers.* 102
3. In an action against an attorney for suffering a debtor of the Plaintiff to be superseded, proof that such debtor was a married woman, destroys the action, when the declaration states that she was indebted. *Lee v. Ayrton one, &c.* 119
4. Q. Whether the declaration would be good without stating that the original Defendant was indebted to the Plaintiff. *ib.*
5. Where a declaration states that the Defendant was an attorney of the Court of Session, the production of his bill for business done in that Court is not sufficient proof of the averment. *Green v. Jackson.* 237
6. If a bill filed against an attorney in vacation be entitled of the preceding term, and the Defendant plead the stat. of Limitations, he may shew when the bill was in fact filed. *Snell v. Phillips.* 209

AUCTIONEER.

1. Where an auctioneer does not name his principal at the time of the sale, he is personally liable to an action for damages for not completing the contract. *Hanson v. Roberdeau.* 120

2. If one of the conditions of sale is that a certain sum *per cent.* shall be paid as a deposit, and the auctioneer accepts a less sum, he cannot afterwards object that too little was paid. Page 120

B

BAIL

1. Bail above, put in by the sheriff (who discharged the Defendant without a bail bond) may surrender the Defendant. *Rex v. Butcher.* 169

BANKRUPT,

See EVIDENCE, No. 30. PLEADING, No. 10. WITNESS, No. 1. 12.

1. Though a trader deny himself for the express purpose of becoming a bankrupt, such denial will support a commission taken out by a petitioning creditor who was not privy to it. *Roberts v. Teasdale* 27
2. If a trader deliver over a bill of exchange to another for a valuable consideration, and forget to indorse it, he may indorse it after he has become a bankrupt. *Smith v. Pickering.* 50
3. And in such case the evidence of one partner that his partner had told him *at the time*, that he had paid the bill away is admissible. *ib.*
4. Where a trader buys goods on credit and commits an act of bankruptcy, the creditor may take out a commission before the day of payment although no written security

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*curity is given for an debt. Com-
me semble. Henbest v. Brown.*

Page 54

5. To support a commission of bank-
rupt it is necessary that the peti-
tioning creditor's debt should be
contracted before the bankrupt
ceases to be a trader. *Dawe v.*
Holdsworth. 64

6. But if the debt be contracted
whilst he is in trade, and a bond is
given for it afterwards, it is suffi-
cient. *ib.*

7. If *A.* be indebted to *B.* in £100
and then leave off trade, and
afterwards contract a further
debt, but pay more than £100
without applying it to any parti-
cular account; it must be placed
to pay off the old debt first, and
B. cannot afterwards be a peti-
tioning creditor. *ib.*

8. A schoolmaster buying books and
shoes and selling them to his scho-
lars at an advanced price, is not a
trader within the bankrupt laws.
Valentine v. Vaughan. 76

9. If *A.* fraudulently procure a bill
of exchange from *B.* and after-
wards become bankrupt, and his
assignees receive money for the
bill; *B.* may recover it from
them in an action for money had
and received. *Harrison v. Walker.*
111

10. If an uncertificated bankrupt
carry on trade and sell goods to *A.*
no one can dispute his title but the
assignees. *Laroche v. Wakem.*
140

11. Assignees of a bankrupt are not
liable for the rent of premisses as-
signed to them by the commis-
sioners unless they take possession.
Bourdillon v. Dalton. 239

12. When an assignee is removed
and assigns his interest to the other
assignees, they may maintain an
action against him for money had
and received to recover the money
received by him as assignee. *Smith*
v. Jameson. Page 213

BANK STOCK,

See EVIDENCE, No. 11, 12.

BARON AND FEME,

See CRIM. CON. WITNESS, No.
9, 10.

1. No action lies for harbouring the
Plaintiff's wife when she is kept
by the Defendant from a princi-
ple of humanity to protect her
from the ill treatment of her hus-
band. *Philp v. Squire.* 82

BARRISTER.

1. No action lies against him for
misconduct. *Fell v. Brown.* 96
2. Or to recover back the fee given
him. *Turner v. Philipps.* 122

BASTARD,

See ASSUMPSIT, No. 2. FALSE
IMPRISONMENT, No. 2.

1. If the putative father of a bastard
child agrees to indemnify the pa-
rish, they may demand any security
they think proper. *Dickenson v.*
Brown. 234

BILL OF EXCHANGE,

See BANKRUPT, No. 2, 3. FOR-
GERY, No. 1, 3, 4. PROMISSORY
NOTE. WITNESS, No. 2, 3, 4,
5, 6. 27

1. A general

A TABLE OF THE PRINCIPAL MATTERS.

1. A general receipt on the back of a bill of exchange is *prima facie* evidence of its having been paid by the acceptor, and will not of itself be evidence of a payment by the drawer though produced by him. *Scholey v. Walsby*. P. 25
2. If there is no consideration for part of a sum contained in a bill of exchange, the Jury may give damages for so much as there is a good consideration for. *Barber v. Backhouse*. 61
3. So if it is given as a security for the performance of an agreement, the Jury, in an action on the bill, may give so much in damages as will satisfy the injury the payee has sustained. *Ledger v. Ewer*. 216
4. Where several persons trade under a particular firm, and some, without the concurrence of the others, draw bills under that firm, all are liable to an indorsee. *Baker v. Charlton*. 80
5. It is no defence to an action at the suit of an indorsee of a bill of exchange that the bill was not stamped at the time of making it, if it has a proper stamp when produced at the trial. *Wright v. Riley*. 173
6. If the holder of a bill of exchange agrees not to sue the acceptor upon his making an affidavit that the acceptance is a forgery, and such affidavit is sworn, he cannot afterwards maintain an action on the bill though the affidavit is false. *Stevens v. Thacker*. 187
7. *Aliter*, if the affidavit is only ingrossed and not sworn. *ib.*
8. It is no excuse for not giving no-

tice to the indorsee of a bill of exchange that the acceptor had no effects. *Wilkes v. Jucks*, P. 202

9. When the payee of a bill of exchange has indorsed it *in blank*, no subsequent indorsee can restrain its negotiability by a *special* indorsement. *Smith v. Clarke*. 225

1. If *A.* has an equitable title to goods on board a ship and *B.* knowing of such title gets an indorsement of the bill of lading, he cannot recover such goods in an action of trover; but the captain will be justified in delivering the goods to *A.* *Dick v. Launsden*. 189

BILL OF MIDDLESEX,

See PLEADING, No. 12.

BILL OF SALE.

1. The bill of sale of vessels for inland navigation need not be registered. *Laroche v. Wakeman*. 141

BOND,

See EVIDENCE, No. 7, 8, 12, 24.

C.

CARRIER,

See TROVER, No. 1. WITNESS, No. 22.

1. By the custom of the river *Thames* the master of a vessel is bound to guard

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guard the goods laden into a lighter sent for them by the consignee until the lading is complete, and cannot discharge himself from the obligation by telling the lighter-man that he has not a sufficient number of hands on board to take care of them. *Catley v. Wintringham.* Page 130

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CONFIDENCE.

1. An interpreter who is present at conversations between a foreigner and his attorney is bound to the same secrecy as the attorney himself, and ought not to divulge the facts confided to him, after the cause for the purpose of which the confidence was placed is at an end. *Du Barré v. Livette.* 77
2. But a confession made by a papist to a protestant clergyman may be given in evidence. *Rex. v. Sparks.* cited 78
3. An attorney who prepares deeds which are granted on an usurious consideration may be called as a witness to prove the usury. *Duffin v. Smith.* 109

CONTRACT.

1. When a contract shall be said to be complete and when executory vide *Set off* No. 1.
2. Where a builder is employed to do work for a certain sum and additions are made, he is bound by the contract as far as it can be traced, and entitled to go on a quantum meruit for the excess only. *Pepper v. Burland.* 103

3. But if the contract is wholly abandoned he may go on a quantum meruit for the whole work. Page 103

CORPORATOR,

See WITNESS, No. 24.

COSTS.

1. If an action brought under the direction of the court of chancery is defeated by a formal objection, that court will make the party taking such objection pay all costs. *Wray v. Barwis.* 69
2. Costs paid to a defendant in equity ought to be allowed to a Plaintiff in his costs at law. *Comme semble.* *Grant v. Jackson.* 204

COVENANT,

See LANDLORD AND TENANT, No. 1.

COVERTURE,

See PLEADING, No. 2.

1. If a Defendant be let in to plead on the terms of not availing herself of her coverture, she cannot shew that the Plaintiff trusted her husband and not her. *Snell v. Rice.* 235

CRIMINAL CONVERSATION.

1. No action lies for crim. con. committed after the husband is separated from his wife. *Bartolot v. Hawker.* 7
2. Proof

A TABLE OF THE PRINCIPAL MATTERS.

2. Proof that the husband voluntarily permitted his wife to live in a state of adultery, goes to bar the action, and not merely to mitigate the damages. *Hodges v. Windham.* Page 39

D.

DECEIT.

1. To support an action for a false assertion as to the circumstances of a third person, it must appear that the Defendant intended to impose on the Plaintiff, and that the Plaintiff relied on his information. *Scott v. Lara.* 226

DEIST,

See WITNESS, No. 7.

DEED,

See EVIDENCE, No. 7, 8, 13, 24.

DIVORCE,

See WITNESS, No. 9.

DISSENTERS.

1. On an indictment for disturbing protestant dissenters in the exercise of their religious worship, it is not necessary to prove that the oaths mentioned in the Toleration Act have been taken. *Rex v. Hube.* 189
2. German Lutherans are within the protection of that act of parliament. *ib.*

3. And it is no defence to an indictment that the Defendant entered the chapel for the purpose of asserting his right to the clerk's reading desk. Page 132

DISTRESS.

1. Wearing apparel may be distrained for rent, under the statute. *Bisset v. Caldwell.* 36

E.

EAST INDIA COMPANY,

See ACTION, No. 5, 6.

EJECTMENT.

1. *Qu.* Whether a year's notice to quit is necessary where it is the custom of the country to give that notice. *Roe dem. Henderson v. Charnock.* 4
2. A refusal to pay rent to a devisee in a will which was contested, is not such a disavowal of the title as to entitle such devisee to maintain an ejectment without giving a previous notice to quit. *Doe dem. Williams v. Passyali.* 196

ESCAPE,

See ASSUMPSIT, No. 5. WITNESS, No. 21.

EVIDENCE,

See FORGERY. PERJURY. PRODUCING EVIDENCE. PLEADING.

1. If the parties agree to a reference, and either party in the course

A TABLE OF THE PRINCIPAL MATTERS.

1. course of that reference admit a fact which the Court of Chancery would have compelled him to admit, such admission may be given in evidence. *Slack v. Buchanan* Page 5.
2. *Aliter* if it were an admission merely for the purpose of purchasing peace. *ib.*
3. In an action against one partner evidence may be received of the admission of another. *Combe v. Thwaites v. Richardson.* 10
4. A copper-plate map taken by the direction of overseers of the poor of a parish, is no evidence to prove a particular spot of ground a high way. *Petherick v. Scott.* 19
5. Hand-writing cannot be proved by a comparison of hands. *Mafferson v. Thoyles,* 20. *Brookland v. Woodley.* *ib.* n.
6. In an action brought by one partner, another may be called as a witness to prove the debt paid to him. *Evans v. Silverlock.* 21
7. If the name of a fictitious person be put as a subscribing witness to the execution of a deed, proof of the party's ad-writing is sufficient. *Parker v. Brown.* 22
8. So if the subscribing witness swears that he never saw it executed. *Greaves v. Neal.* 27
9. A ship-builder may be called as a witness to give his opinion as to the sea-worthiness of a ship, on the facts stated by others. *Thornston v. Royal Exchange Assurance Company.* 28
10. So may commercial men, to prove the meaning of a particular expression in a letter on a commercial subject. *Chaurmont v. Angerstein.* 33
11. Parol evidence cannot be given of the transfer of stock, but copies from the books of the Bank must be proved. *Bretton v. Cope.* P. 30
12. A transfer of stock is evidence on a plea of payment to an action on a bond. *ib.*
13. An instrument executed in the presence of a subscribing witness cannot be proved by any other person, even after it is cancelled. *ib.*
14. Where one partner delivers over a bill of exchange and absconds, the other may be called as a witness to prove that his partner told him he had paid it away for a valuable consideration. *Smith v. Pickering.* 50
15. Evidence that the original Defendant acknowledged the debt, is admissible in an action against the sheriff for a false return. *Kempland v. Macauley.* 61
16. To prove the Defendant in a criminal prosecution, the author of a libel, evidence of other libels written by him, on the same person and concerning the same subject may be read. *Re v. Pearce* 75
17. So in an action, to prove the malice of the Defendant. *Lee v. Huson.* 160
18. A copy of a newspaper may be read in evidence, though not stamped according to act of parliament. *Re v. Pearce* 75
19. To prove the publication of a new paper, it is not necessary to produce a copy which has been actually published. *ib.*
20. Proof of the delivery of a paper to the servant of the Defendant in a criminal prosecution, is not of

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- of itself sufficient to entitle the prosecutor to give parol evidence of it. *Page 75*
21. Though a witness cannot give parol evidence of the particular contents of written accounts, he may speak to the general balance. *Roberts v. Doton.* 83
22. A bond executed by the Defendant acknowledging himself guilty of a nuisance, is good evidence on an indictment for carrying on the same business in another place. *Rei v. Neville.* 91
23. On a question between landlord and tenant, whether rent was payable quarterly or half-yearly, evidence of the mode in which other tenants pay their rents is not admissible. *Carter v. Pryke* 95
24. Where the subscribing witness to a deed is resident abroad, his hand-writing is to be proved as if he were dead. *Hobbes v. Pontin.* (a) 100
25. Parol evidence of the oath required by the Toleration Act having been taken, is not admissible. *Rei v. Hube* 102
26. On an issue whether a churchwarden ought to be elected by a select vestry or the parish at large, a record between a former churchwarden and another person is admissible evidence. *Berry v. Banner.* 106
27. An account in the hand-writing of a person borrowing money is no evidence for the lender in an action for usury brought against him by a common informer. *Maughamquham v. Walker.* 103
28. Parol evidence of a letter containing an account of the disho-

- nour of a note of hand, is not admissible, unless notice has been given to produce the letter. *Shaw v. Markham.* *Page 165*
29. An admission in an answer to a bill filed by other creditors against the Defendant may be read as evidence against him. *Grant v. Jackson.* 203
30. If several are sued and one pleads his bankruptcy, upon which the Plaintiff enters a *nolleprosequi* as to him, he may still give evidence of the admission of such Defendant made before he obtained his certificate. *ib.*
31. A record of conviction on an indictment against a parish for not repairing a road, is conclusive evidence of the liability of that parish to repair. *Raz v. Inhabitants of St. Pancras.* 219

EXECUTION.

1. If a *fi. fa.* is delivered to the sheriff, and he is directed by the Plaintiff, not to levy thereon till a future day, and in the mean time another writ is delivered, he is to levy on the first writ as if no other had been delivered to him. *Kempland v. Macauley.* 65

EXECUTOR,

See ASSETS.

1. An executor in trust has a sufficient interest to entitle him to insure a life, on which the testator had an annuity, in his own name. *Pick. ell v. Ankerstein.* 151

EXECU-

A TABLE OF THE PRINCIPAL MATTERS.

EXECUTOR DE SON TORT.

1. A man who possesses himself of the goods of the deceased under the authority, and as agent of the rightful executor, cannot be charged as executor *de son tort*. *Hall v. Elliot, Executor, &c.* Page 86

F.

FALSE IMPRISONMENT,

See PLEADING, No. 5, 6.

1. If when a man is apprehended, and in the custody of officers of justice a third person espouses his cause and insults the prosecutor, the officers may imprison such third person. *White v. Edmunds.* 89
2. A justice's warrant to apprehend a man for bastardy continues in force till fully executed, and if he be apprehended and discharged without having fully complied with the warrant, he may be again apprehended. *Dickenson v. Brown.* 234

FIERI FACIAS,

See EXECUTION.

FLEET BOOKS.

The *Fleet* books are admissible, though weak evidence on a question of pedigree. *Lawrance v. Dixon.* 136

But to prove a marriage, they are not admissible. *Read v. Passer.* 231

FOREIGN LAWS.

1. *English* courts cannot take notice of them till proved by witnesses. *Ganer v. Lady Lanesborough.* Page 18

FORGERY,

See BILL OF EXCHANGE, No. 6, 7.

1. In an action against the acceptor of a bill of exchange, who defends himself on account of his acceptance having been forged by *A.* Evidence that *A.* had forged his acceptance to another bill, and absconded on that account is not admissible. *Balcetti v. Serani.* 142
2. But on an indictment for forging a bank note, drawings of different parts of a bank note found in the custody of the prisoner are admissible. *Lamb's case* cited. *ib.*
3. If the holder of a bill of exchange agrees not to sue the acceptor upon his making an affidavit that the acceptance is a forgery, and such affidavit is sworn, he cannot afterwards maintain an action on the bill though the affidavit is false. *Stevens v. Thacker.* 187

FRAUDS (Statute of)

See ASSUMPSIT, No. 1.

G.

GAOLER,

See ASSUMPSIT, No. 5.

A TABLE OF THE PRINCIPAL MATTERS.

GENERAL ISSUE,

See PLEADING, No. 1. 3. 9.

GRAZIER.

1. A book-keeper in *Smithfield* market receiving money for beasts sold there is liable to pay such money to the owner of the beasts, and cannot apply it in payment of a debt due to him from the salesman who employed him. *Goode v. Jones.* Page 177

II.

HAIR POWDER.

1. Hair powder made of starch ground fine, still remains starch, and packages of more than 28lb. weight moved from one place to another must be marked as starch. *Hitchison v. Madock.* 162

HALF PAY.

1. The king may at any time stop the half-pay of an officer, upon signifying his pleasure that it shall be no longer continued. *M'Donald v. Steele.* 175

HAND-WRITING,

See EVIDENCE, No. 3.

HEARSAY,

See EVIDENCE, No. 14.

HIGHWAY,

See EVIDENCE, No. 4. 31. PLEADING, No. 20. WITNESS, No. 11.

HORSE-RACE.

1. On a wager that *A.* will trot two horses 16 miles in two successive hours, he may trot them in any manner he thinks proper. *Robson v. Hall.* Page 127

HOUSE,

See PLEADING, No. 11.

INDEBITATUS ASSUMPSIT,

See PLEADING, No. 7. 10.

INFANT.

1. *Assumpsit* for money had and received lies against an infant to recover money embezzled by him. *Comme semble. Bristow v. Eastman.* 223
2. It is incumbent on a tradesman before he trusts an infant with what may appear to be necessaries to enquire whether he is provided by his friends. *Ford v. Fothergill.* 229

INSOLVENT,

1. If a creditor looks over a deed of composition proposed by his debtor and sends a letter to the debtor's attorney expressing his approbation of it, and afterwards other creditors execute it, he cannot then withdraw himself from the composition and maintain an action. *Butler v. Rhodes* 239

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INTERPRETER,

See CONFIDENCE, No. 1.

JOINT AND SEVERAL.

See PROMISSORY NOTE, No. 1.

JUSTICE OF PEACE,

See NOTICE TO JUSTICES. WARRANT.

1. Qu. Whether he can commit for a contempt of him when not sitting in Court. *Pettit v. Middleton.* Page 62

L.

LANDLORD AND TENANT,

See EJECTMENT. WITNESS, No. 17.

1. Qu. Whether a covenant by a lessee of a public house, that he and his assigns shall buy all the beer consumed in that house, of the lessor, is binding on the assignee. *Hartley v. Pechall.* 131

LEGACY.

1. No action at law lies for a legacy. *Farish v. Wilson.* 73

LIBEL,

See EVIDENCE, No. 16, 17.

1. The proprietor of a place of public amusement cannot maintain an action for a libel on an actress whereby she was deterred from

appearing on the stage. *Ashley v. Harrison.* Page 194

LIMITATION OF ACTIONS.

1. The Defendant saying to the Plaintiff "what an extravagant bill you have delivered me" is a sufficient acknowledgment to avoid the statute of limitations. *Lawrence v. Worrall.* 93
2. Where there is a mutual unsettled account and reciprocal demands, the statute of limitations does not attach. *Cranch v. Kirkman* 121
3. The exception in that statute as to merchants' accounts, is not confined merely to persons of that description. *ib.*
4. The Plaintiff may in any stage of the cause shew when a penal action was commenced. *Maugham qui tam v. Walker.* 163
5. If a bill filed, against an attorney in vacation be entitled of the preceding term and the Defendant plead the statute of limitations he may shew when it was in fact filed. *Snell v. Philips one, &c.* 209

LOTTERY.

1. In an action for insuring tickets in the Irish lottery, the act of parliament establishing such lottery must be proved. *Williams qui tam v. Pulley.* 51
- An illegal policy of insurance of lottery tickets may be read in evidence without being stamped. *Holland qui tam v. Duffin.* 58

A TABLE OF THE PRINCIPAL MATTERS.

3. If several tickets are *injured* at the *same time*, it constitutes but one offence. Page 58
4. *Iliter*, if at *different* times on the *same day*. ib.

M.

MAIL COACH.

1. The proprietors of a mail coach are answerable for any injury happening to a passenger through the negligence of their driver. *White v. Boulton*. 81

MALICIOUS PROSECUTION.

1. If *A.* strike *B.* and *B.* return the blow, on which *A.* indicts *B.* for an assault, the bare fact of *A.* having struck the first blow is not sufficient to support an action for a malicious prosecution. *Fish v. Scott*. 135
2. In an action for a malicious arrest the Plaintiff must prove the sheriff's warrant on the writ against him. *Lloyd v. Harris*. 174

MAP,

See EVIDENCE, No. 4.

MARINER.

1. No action will lie at the suit of a sailor on a promise of the captain to pay extra wages in consideration of his doing more than the ordinary share of duty in navigating the ship. *Harris v. Watson*. 72

MARRIAGE,

See FLEET BOOKS, No. 2. WITNESS, No. 10.

1. The *form* of words prescribed by the Rubrick for the publication of banns, need not be precisely followed, that part of the act of parliament being merely directory. Page 34
2. May be proved by the reputation of the family. *Reid v. Passer*. 231

MASTER AND SERVANT,

See SERVANT. WITNESS, No. 15.

1. If a clerk to the commissioners of taxes employ a deputy to perform the duties of his office, and new duties are imposed, whereby such deputy's labour is much increased, nevertheless he will not be entitled to an increase of salary, unless there is an express agreement for that purpose. *Bell v. Drummond*, Executor, &c. 45
2. If a master gives his servant money to buy meat for the use of the family, and the servant instead of paying ready money orders the meat on credit and embezzles the money, the master is not liable. *Stubbing v. Heintz*. 47

MONEY HAD AND RECEIVED,

See ASSUMPSIT, No. 3. 6. BANKRUPT, No. 9. 12. INFANT, No. 1. OFFICE, No. 1.

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MONEY PAID, LAID OUT, and EXPENDED,

See ASSUMPSIT, No. 4, 5.

N.

NAVAL STORES,

See WITNESS, No. 26.

NAVIGATION,

See BILL OF SALE.

NEGLIGENCE

See MAIL COACH. SURGEON.

NEW ASSIGNMENT,

See PLEADING, No. 11.

NEWS-PAPER.

1. A news-paper may be read in evidence though not stamped. *Ren v. Pearce.* Page 75
2. To prove the publication of a news-paper it is not necessary to produce a copy which has been actually published. *ib.*

NOTICE to PRODUCE,

See EVIDENCE, No. 28.

NOTICE to QUIT,

See EJECTMENT, No. 1, 2.

NOTICE to JUSTICES.

1. If *A.* is indicted for felony and the judge who tries the indictment, orders the justice before whom the information was laid, to retain the goods until it appears

who is entitled to them, and such justice is guilty of a conversion, it is not necessary to give a month's notice previous to the commencement of an action against him.

Licet v. Reid. Page 35

NUISANCE,

See EVIDENCE, No. 22.

1. A man who sets up a noxious business in a neighbourhood where such business has long been carried on, is not indictable for a nuisance unless the noxious vapour is much increased by his manufacture. *Rex v. Neville.* 91

O.

OATH,

See PLEADING, No. 14.

1. A member of the Kirk of Scotland may be sworn without kissing the book. *Mee v. Reid.* 23

OFFICE and OFFICER,

See HALF-PAY.

1. When a man brings an action for money had and received to try his title to an office he must prove that the Defendant has received fees belonging to the office which he claims. *Green v. Hewett.* 182
2. The under Ushers and Cryers of the Court of King's Bench are distinct offices from the Chief Usher and Cryer, and not dependant on him. *Comme semble.* *ib.*

A TABLE OF THE PRINCIPAL MATTERS.

OPINION,

See EVIDENCE, No. 9, 10.

ORDER for PARTICULARS,

See SET-OFF, No. 2.

P.

PARLIAMENT,

1. In an action for the costs of a frivolous petition against the election of a member of parliament, it is not necessary to prove either the Defendant's subscription of the petition or a demand of the costs previous to the commencement of the action. *Cleveland v. Wilson.* Page 106

PAROL EVIDENCE OF PAPERS, &c.

See EVIDENCE, No. 11, 20, 21, 25, 28. VOIR DIRE, No. 1.

PARTNER,

See BILL OF EXCHANGE, No. 4. EVIDENCE, No. 3, 6, 14, 30. WITNESS, No. 13, 25.

1. When partners dissolve their partnership, it is incumbent on them to publish notice of such dissolution in the *Gazette*, or they will be all liable to the action of a creditor who did not know of the dissolution. *Gorham v. Thomson.* 42
2. And even notice in the *Gazette* is not sufficient to affect a creditor who has not read such notice. *Graham v. Hope* 154

3. Partners cannot deprive their debtor of his set-off by indorsing a note of hand to any one in payment of a debt due from the others to him. *Puller v. Roe.* Page 197

PAYMENT.

1. If a debtor is directed by his creditor to remit bills by the post and the bills are lost, the creditor must bear the loss. *Warwick v. Youkes.* 67
2. But in such case the person remitting should deliver the letter at the post-office, and not to a bellman in the street. *Hawkins v. Rutt.* 186

PEDIGREE,

See FLEET BOOKS, No. 1.

PERJURY,

See PLEADING, No. 3, 12, 14, 15. WITNESS, No. 8, 20, 23.

1. On an indictment for perjury committed on the trial of a former cause, the prosecutor must prove the whole of the Defendant's evidence. *Rex v. Jones.* 38
2. But if the perjury was committed in answer to a question which could only arise on the cross examination, it is sufficient to prove that examination. *Rex v. Dorelin* 170
3. If in an answer to a bill filed by A. for redemption of lands assigned to him by B. the Defendant swears that he had no notice of the assignment, and therefore insists on tacking a bond debt due to him from B. to his mortgage, this is

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a material fact on which perjury may be assigned. *Rex v. Pepys.*
Page 138

PILOT.

1. A pilot who has the steering of a ship is liable to an action for an injury done by his personal misconduct, although a superior officer is on board. *Stort v. Clements.* 107

PLEADING,

See ATTORNEY. No. 3, 4. SET-OFF, No. 1.

1. A plea of the general issue to an information in the Exchequer against *A.* for having smuggled goods in his possession, does not put in issue the forfeiture of the goods, and if in stating the record it is said to be an issue touching and concerning the forfeiture of the goods, it is a fatal variance. *Rex v. Hawkins.* 8
2. On the general replication to a plea of coverture, the Plaintiff may prove that the person to whom the Defendant was married, was married to another woman. *Gaver v. Lady Lancashire.* 17
3. A recital that *an* issue came on to be tried is supported by evidence that an information containing several counts to each of which the Defendant pleaded the general issue, was so tried. *Rea v. Jones.* 37
4. Under the *alia enormia* in trespass, no facts can be given in evidence which might, consistent

- with decency, be stated on the record. *Lowden v. Goodrick.* P. 46
5. Therefore on a declaration for false imprisonment the Plaintiff cannot give in evidence that he was stinted in his allowance of food, unless it is specially stated in the declaration. *ib.*
6. Or that being confined in a common prison she caught the gaol fever, unless it is specially laid as a consequence of the imprisonment. *Pettit v. Addington.* 62
7. If goods are sold on the terms of sale or return, and the person receiving them does not return them in a reasonable time, the value of them may be recovered in an action for goods sold and delivered. *Bayley v. Goldsmith.* 56
8. In a penal action for exercising a trade without having served an apprenticeship thereto, the Plaintiff is not obliged to prove that the Defendant used the trade all the time laid in the declaration, if it is said that he forfeited 10s. for each month. *Powell qui tam v. Farmer.* 57
9. When the Plaintiff is in the actual possession of the close, the Defendant in an action of trespass cannot give evidence of property in a stranger under the general issue. *Philpot v. Holmes.* 67
10. When a bankrupt promises to pay a debt due before his bankruptcy, the Plaintiff may declare generally on the original consideration. *Williams v. Dyde.* 68
11. If *A.* be in possession of part of a house, and *B.* of the residue, and an officer enters into *A.*'s part under a writ against *B.*'s goods

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- goods which are not there, *A.* may maintain trespass against the Officer for breaking and entering his *house*, and need not make any new assignment to a justification under the writ against *B. Fallon v. Anderson.* Page 110
12. An indictment stating a bill of *Middlesex* to have issued out of the *King's Bench Office* is bad. *Rex v. Schoole.* 112
13. Where money betted is paid into the hands of a banker who gives a receipt to the persons betting as received of *them*; the winner cannot recover the money on the common count on a wager, but must state that the money was so paid, and that the Defendant refused to permit him to receive it. *Robson v. Hall.* 128
14. If a witness who is a Scotch covenantor be sworn on the *Testament*, and afterwards according to the ceremony of his own country, he may be indicted for perjury as having sworn on the Testament. *Rex v. McCarther.* 155
15. It is sufficient in an indictment for perjury to state that the Defendant was *in due manner sworn*. *ib.*
16. Where in pleading it is stated that from time immemorial "there has been a select vestry composed of a *certain* number of select persons," it is incumbent on the party making that averment to prove that the vestry has consisted of a definite number. *Berry v. Banner.* 157
17. So if it had been stated that the vestry was composed of a *certain* select number of persons. *Comme semble.* *ib.*
18. A submission to arbitration may be given in evidence on a count on the original promise. *Kingston v. Pheips.* Page 227
19. An averment that the Defendant is an attorney of a particular court is not proved by the production of his bill of fees for business done in that Court. *Green v. Jackson.* 237
20. An indictment against a parish for not repairing one side of a road (the other side laying in another parish) ought to state that each parish was liable to repair *ad filum medianiæ*, and not merely that a certain part of the road *in breadth* 15 feet was out of repair. *Rex v. The Inhabitants of St. Pancras.* 249

POLICY OF INSURANCE.

1. When it is said in a letter that a ship will sail from *St. Domingo* in the month of *October*, it is generally understood that she will not sail till the 25th of that month. *Charaund v. Angerslein.* 43
2. An executor in trust has a sufficient interest to entitle him to make assurance on the life of a person who has granted an annuity to his testator. *Tidswell v. Ankersien.* 151
3. Where a policy is on a ship bound to a foreign port until she is 24 hours moored *in safety* there, and previous to such ship's arrival at her destined port an embargo is laid on all *English* vessels in that port, and she on entering it is also detained and her crew made prisoners of war; the assured is entitled to recover. *Minnett v. Anderson.* 211
4. When

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4. When a ship is driven by stress of weather on an enemy's coast, and there captured, it is a loss by capture and not by the perils of the seas. *Green v. Elmstie* Page 212

PRACTICE.

1. The privilege of replying, when the Defendant in a criminal prosecution does not call witnesses, is confined to the Attorney General. *Comme semble. Rex v. Earl of Abingdon.* 237

PRODUCING EVIDENCE.

1. A party is not obliged to produce evidence against himself, though such evidence is in Court, and he has had notice to produce it. *Law v. Wells.* 93

PROMISSORY NOTE,

See BILL OF EXCHANGE. WITNESS, No. 2, 3, 4, 5, 6. 27.

1. A promissory note signed by two persons and beginning "I promise, &c." is joint and several. *March v. Ward.* 131
2. A man who at the request of the holder of a note has put his name upon it and thereby been obliged to pay the contents to a *bonâ fide* holder, may recover the money paid from any person whose name is on the note, although he knew it was given on an illegal consideration. *Seddons v. Stratford.* 215

Q.

QUANTUM MERUIT,

See CONTRACT, No. 2, 3. MASTER and SERVANT, No. 1. SURVEYOR.

R.

RECEIPT,

See STAMPS, No. 1.

1. A general receipt on the back of a bill of exchange is *prima facie* evidence of a payment by the acceptor, and will not of itself be evidence of a payment by the drawer, though produced by him. *Scholey v. Welsh.* Page 25

REMITTANCE,

See PAYMENT.

RES INTER ALIOS ACTA.

Where Evidence,

See EVIDENCE, No. 26, 27, 29, 31.

S.

SALE OR RETURN (Contract of).

Its effect. 56

SERVANT,

See MASTER and SERVANT.

1. If a clerk to the commissioners of taxes employ a deputy to execute his office, and new duties are imposed whereby such deputy's labour is much increased, nevertheless

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theless he is not entitled to an increase of salary, unless there is an express agreement for that purpose. *Bell v. Drummond*, Executor. Page 45

2. A master may maintain an action for debauching his maid servant, though he is no wise related to her in blood. *Fores v. Wilson*. 55
3. In an action for debauching a maid servant *per quod &c.*, it is not necessary to prove that she was employed as a menial servant. *ib.*
4. So in an action for beating the Plaintiff's infant son, who resided in his family. *Jones v. Broken*. 233
5. A father who permits a married man to visit his daughter as a suitor, cannot maintain an action against him for seducing her. *Reddie v. Scoolt*. 244

SET-OFF.

1. If *A.* employ *B.* to build a waggon, and when it is finished *B.* refuse to deliver it until the money is paid, still the contract is executed and *B.* may set off the money which was to have been paid for the waggon as for goods bargained and sold. *Scarb. Dunmore v. Taylor*. 41
2. Where the Plaintiff obtains an order for the particulars of the Defendant's set-off and upon an application to the Defendant's attorney to deliver a particular under the order, he refers to an account already delivered by his client, he is not obliged to deliver a fresh particular. *Hatchet v. Marshall*. 172
3. *A. B. C.* and *D.* are in partnership together, and *C.* and *D.* also

trade on their separate account: the partnership of *A.* and *Co.* becomes indebted to *C.* and *D.* and to satisfy such debt they indorse a note given to them all. * In an action by *C.* and *D.* as indorsees of the note, the debtor may set off any demand he has against *A.* and *Co.* *Puller v. Roe*. P. 187

4. It is no objection to the set-off of a debt that the Defendant had commenced an action for the recovery of it, before the Plaintiff's cause of action accrued. *Knibbs v. Hall one, &c.* 210

SHERIFF,

See ASSUMPSIT, No. 4. EVIDENCE, No. 15. EXECUTION.

SPIRITUOUS LIQUORS.

1. The stat. 24 Geo. 2. against selling spirituous liquors in quantities under the value of 20s. does not extend to liquors sold for the purpose of being sold again. *Jackson v. Attrill*. 180

STAMPS,

See LOTTERY, No. 2. NEWSPAPER, No. 1.

1. An acknowledgment of having received the acceptance of a bill of exchange is a receipt for money within the stat. 23 G. 3. and liable to the stamp duty imposed by that stat. on such receipts. *Scholey v. Walshy*. 24
2. Where 2 persons by an agreement in writing lay a wager, and then by another agreement indorsed on the first consent that the bet shall be

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be doubled, there must be two agreement stamps. *Robson v. Hall.* Page 128

3. But if there is only one stamp the winner may recover the first bet on account thereon. 128
4. An agreement not stamped cannot be given in evidence for any purpose whatever, not even to shew that the party meant to commit a fraud by that agreement. *Whitwell v. Dimsdale.* 167

STARCH,

See HAIR-POWDER.

SUBSCRIBING WITNESS,

See EVIDENCE, No. 7, 8, 13, 24.

SURGEON.

1. It is a good defence to an action brought by him that he has treated his patient ignorantly or negligently. *Kannen v. M'Mullen.* 59
2. *Aliter*, if he acted under the direction of a physician. *ib.*

SURVEYOR.

1. He is entitled to be paid according to his labour, and not according to the amount of the bills he looks over and settles. *Upsdell v. Stewart.* 193

T.

TENDER,

See ASSUMPSIT, No. 1.

1. If *A.* be indebted to several persons in different sums of money,

and when they are all assembled together, tenders them one gross sum, which they refuse to receive, *each insisting that more is due to him*, this is a good tender. *Black v. Smith.* Page 88

2. It is not necessary to produce the money tendered when the creditor insists that more is due. *ib.*
3. A creditor cannot object to the formality of the tender, on account of a receipt being demanded, if he did not object to it on that account at the time. *Cole v. Blake.* 179

TRESPASS,

See PLEADING, No. 4, 5, 6, 9.

TRIAL.

1. The Court will put off the trial on an affidavit of the *attorney* that a material witness is kept out of the way. *Duberley v. Gunning.* 97

TROVER,

See BILL OF LADING, No. 1.

1. If a carrier has goods to carry, and by mistake deliver them to a wrong person, *trover* lies. *Youl v. Harbottle.* 49

V.

VARIANCE,

See PLEADING.

VENDOR AND VENDEE,

See WARRANTY.

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VESTRY, •

See EVIDENCE, No. 26. PLEAD-

1. A select vestry can only be supported by immemorial usage.
Berry v. Banner. Page 157

VOIR DIRE. •

1. When a witness is rendered incompetent by his examination on the *voir dire*, he may be asked any question to shew his interest at an end, though the act by which his interest is destroyed, is matter of record. *Botham v. Skingle.* 218

U.

USURY,

See CONFIDENCE, No. 3. EVIDENCE, No. 27. WITNESS, 27.

1. Where a country banker discounting a bill, takes interest for the whole time the bill has to run, and instead of paying money for the bill, gives notes payable in London three days after sight he is guilty of usury. *Matthea's qui tam v. Griffiths.* 200

USE AND OCCUPATION.

1. An action for use and occupation will not lie where the Defendant came into possession of the premises under an agreement to purchase, upon an assurance on the

part of the Plaintiff that he had a long term, and where the occupation has been an injury, instead of a benefit to the Defendant.
Hearne v. Tomlin. Page 192

W.

WAGER,

See HORSE RACE. PLEADING, No. 13. STAMPS, No. 2, 3.

WAGES,

See MARINER, No. 1.

WAREHOUSE-MAN.

1. A warehouse-man is bound to common diligence only. *Califf v. Danvers.* 114

WARRANT,

See MALICIOUS PROSECUTION, No. 2.

1. A justice's warrant to apprehend the putative father of a bastard continues in force till fully satisfied, and if he is arrested and discharged, on a promise to give security, he may be again apprehended on the same warrant. *Dickenson v. Brown.* 234

WARRANTY.

1. The seller is bound to disclose to the buyer all latent defects known to him. *Mellish v. Motteux.* 115
2. *A.* not knowing the age of a horse, but having a written pedigree,

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gree, sold him according to the pedigree, at the same time saying he knew nothing of him but what he learnt therefrom, he is not liable to an action on a warranty. *Dunlop v. Waugh.* Page 123

WITNESS,

See CONFIDENCE. EVIDENCE, No. 7, 8. 13. VOIR DIRE, No. 1.

1. A trader who has been twice a bankrupt cannot be a witness to increase his estate under the second commission, until he has paid 15s. in the pound. *Kennet v. Greencollers.* 3
2. In an action against the maker of a promissory note, the indorser is an admissible witness to prove it paid. *Charington v. Milner.* 6
3. So is the drawer of a bill of exchange in an action against the acceptor. *Humphrey v. Moron.* 32
4. *Qu.* Whether he can be a witness when it appears that he had regular notice of the dishonour. *ib.*
5. *Qu.* Whether the drawer may be admitted to prove that the acceptance was conditional. *Phetheon v. Whitmore.* 40
6. Or that the bill, though dated abroad, was drawn in *England*, and is therefore void for want of a stamp. *Adams v. Lingard.* 117
7. In order to ground an objection to the competency of a witness, he is not to be asked whether he believes in *Jesus Christ*, or the *Holy Gospels*, but whether he

believes in *God* and a future state. *Rex v. Taylor.* Page 11

8. The Defendant in a former cause against whom a verdict was obtained on the perjury of the *only* witness in that cause, and who has filed a bill for relief, cannot be a witness on an indictment for that perjury, although he has since paid the money. *Rerv. Dalby.* 12
9. A Jewess is a good witness to prove her own divorce in a foreign country, according to the rites of the Jews there. *Ganer v. Lady Lanesborough.* 18
10. And a man who has been in fact married may be a witness to prove such marriage illegal.—*Standen v. Standen.* 32
11. It is no objection to the competency of a witness who comes to prove a highway, that he is owner of an adjoining close, and has let a road to *A.* which he cannot use unless the road in dispute is established. *Pollard v. Scott.* 18
12. A creditor who releases to the assignees of a bankrupt is a good witness to prove an act of bankruptcy. *Koops v. Chapman.* 19
13. In an action by one partner, another is an admissible witness to prove the debt paid to him. *Evans v. Silverlock.* 21
14. In an action for sinking a barge on board of which the Plaintiff had a cargo of corn, the master may be a witness upon being released by the Plaintiff. *Spitty v. Bowers.* 53
15. So in an action against the owner for not safely carrying it. *Lay v. Holoock.* 101

16. But

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16. But the owner cannot be a witness to prove the ship sea-worthy, in an action on a policy of insurance until released. *Rothroe v. Elton.* Page 84
17. No action lies against a witness for not attending unless the cause was called on and the jury sworn. *Bland v. Swafford.* 60
18. In an ejectment between two persons (both claiming under a demise from the same person) the landlord who has become a bankrupt, may be a witness to prove that the premises in dispute were not contained in the first lease. *Longchamp dem. Ecits v. Faircl.* 71
19. A person about whose house business has been done by the Plaintiff, is not a good witness to prove the Defendant liable, until released by the Plaintiff. *New v. Chidgey.* 98
20. A party who has succeeded in a suit, is a good witness on an indictment for perjury committed in the course of that suit. *Rex v. D'Farra.* 104
21. A man who has been arrested may be called as a witness in an action for permitting his escape. *Cass v. Cameron.* 124
22. A book-keeper, who receives goods for a carrier, is a good witness for him without a release. *Spencer v. Goulding.* 129
23. It is no objection to the competency of a witness on an indictment for perjury committed in an answer in Chancery, that in

- his answer to a cross bill which is still pending, the witness has sworn the fact which he is to prove on the indictment. *Rex v. Popy.* Page 138
24. Mere trustees of a charity may be witnesses in an action brought against themselves in their corporate capacity. *Weller v. Governors of the Foundling Hospital.* 153
25. A man who is proved to be a partier with the Defendant cannot be examined to prove that he only is liable. *Goodacre v. Breame.* 174
26. The person giving information that the Defendant concealed naval stores, may be a witness on an indictment for the offence. *Rex v. Cole.* 217
27. In an action against the acceptor of a bill of exchange the drawer may be a witness to prove that it was given on an usurious consideration. *Rich v. Topping.* 224

WORDS.

1. Words which unexplained import a charge of felony are not actionable if spoken in reference to a breach of contract or trespass. *Cristie v. Cowell* 4
2. Words spoken at different times, may be given in evidence on one count. *Charlter v. Barret.* 22
3. So in an action for words spoken to *A.* words (not actionable) spoken to *B.* may be given in evidence to increase the damages. *Mead v. Daubigny.* 125

THE END.

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